No. 811

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

North Western Hanna Fuel Co., Berwind Fuel Company, Carnegie Dock and Fuel Company, Inland Coal & Dock Company, Division of the North American Coal & Dock Company,

*Appellants,*

vs.

United States of America, Interstate Commerce Commission, and Railroad and Warehouse Commission of the State of Minnesota,

*Appellees,*

and

Canadian National Railway Company, et al.

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

## JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1957

No. .....

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NORTH WESTERN - HANNA FUEL CO.,
BERWIND FUEL COMPANY,
CARNEGIE DOCK AND FUEL COMPANY,
INLAND COAL & DOCK COMPANY, Division of
THE NORTH AMERICAN COAL & DOCK COMPANY,

*Appellants,*

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,

and

RAILROAD AND WAREHOUSE COMMISSION OF THE
STATE OF MINNESOTA,

*Appellees,*

and

CANADIAN NATIONAL RAILWAY COMPANY,
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
CHICAGO GREAT WESTERN RAILWAY COMPANY,
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY,
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY
COMPANY,
DULUTH & NORTHEASTERN RAILROAD COMPANY,
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY,
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,
MINNEAPOLIS, ANOKA AND CUYUNA RANGE RAILROAD COMPANY,
MINNEAPOLIS, NORTHFIELD AND SOUTHERN RAILWAY,
MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILROAD
COMPANY,
MINNESOTA, DAKOTA & WESTERN RAILWAY COMPANY,
MINNESOTA WESTERN RAILWAY COMPANY,
NORTHERN PACIFIC RAILWAY COMPANY,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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## JURISDICTIONAL STATEMENT

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The North Western-Hanna Fuel Co.; Berwind Fuel Company; Carnegie Dock and Fuel Company; and Inland Coal & Dock Company, Division of the North American Coal & Dock Company (hereinafter called "the coal dock companies") submit this statement to show (1) that this Court has jurisdiction on appeal from the decision and final order of the United States District Court for the 4th Division, District of Minnesota, entered on the 26th day of December, 1957—which dismissed the complaint of the coal dock companies to enjoin the order of the Interstate Commerce Commission dated April 23, 1957, and the order of the Railroad and Warehouse Commission of the State of Minnesota dated May 20, 1957, which pertain to increased railroad freight rates and charges on coal in Minnesota intrastate traffic and (2) that the questions presented by this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

## OPINIONS BELOW

The opinion of the United States District Court for the 4th Division of Minnesota is not yet reported; a copy thereof is set forth in Appendix A hereto. The final order of the United States District Court is set forth in Appendix B. The report, decision and order of the Interstate Commerce Commission, dated April 23, 1957, in Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges,* is reported at 300 I.C.C. 201.[1] The report and order of the Railroad and Warehouse Commission of the State of Minnesota, dated May 20, 1957, is not published and a copy thereof is set forth in Appendix C hereto.

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[1]Commissioners Freas and Minor dissented; Commissioner Tuggle did not participate in the disposition of the proceedings. (300 I.C.C. 201, 224.)

## JURISDICTION

This action was brought by the coal dock companies under the provisions of 28 *U.S.C.* 1336 to suspend, annul, enjoin and set aside an order of the Interstate Commerce Commission dated April 23, 1957, and also to enjoin the enforcement of an order of the Railroad and Warehouse Commission of the State of Minnesota dated May 20, 1957, which was issued in compliance with the aforesaid order of the Interstate Commerce Commission. The decision and final order of the United States District Court was entered on December 26, 1957; and the notice of appeal by the coal dock companies was filed on January 20, 1958.

The jurisdiction of the Supreme Court to review the decision of the United States District Court by direct appeal is conferred by 28 *U.S.C.* 1253 and 2101(b) and is sustained by the following cases: *King v. United States*, 344 U.S. 254 (1952); *North Carolina v. United States*, 325 U.S. 507 (1945); *Railroad Commission of Wisconsin v. Chicago, B. & O. R. R. Co.*, 257 U.S. 563 (1922).

## STATUTES INVOLVED

The pertinent statutory provisions which are involved in this appeal are as follows: Interstate Commerce Act—Sections 13(3), 13(4) and 15a(2), 49 U.S.C. 13(3), 13(4) and 15a(2); the National Transportation Policy—49 U.S.C. preceding Section 1; Administrative Procedure Act—Sections 7(c), 10(c), (e), 5 U.S.C. 1006(c), 1009(c), (e). These statutory provisions are set forth in Appendix D hereto.

## QUESTIONS PRESENTED

1. Whether the Order of the Interstate Commerce Commission increasing Minnesota intrastate rates and charges on bituminous coal should be set aside since the Interstate Commerce Commission failed to make findings as to the following:

   (a) The amount of revenue required to enable the railroads, or each of them, to operate efficiently or to meet costs and expenses;

   (b) The amount of revenue from Minnesota intrastate traffic which would constitute a fair proportion of the railroads' total revenues, or each railroad's total revenues, required in order to render adequate and efficient railway transportation service or to meet costs and expenses;

   (c) The amount of revenue from Minnesota intrastate rail shipments of bituminous coal which would constitute a fair proportion of the railroads' total revenues, or each railroad's total revenues, required in order to render adequate and efficient railway transportation service or to meet costs and expenses.

2. Whether to sustain the findings of the Interstate Commerce Commission as to the railroads' need for additional revenues, evidence showing only the total system revenues, costs and expenses for all Minnesota railroads is sufficient; or whether the revenues, costs and expenses of the Minnesota railroads for interstate and Minnesota intrastate traffic is required; or whether the system or interstate and Minnesota intrastate revenues, costs and expenses of each individual railroad shipping bituminous coal in Minnesota intrastate traffic is required.

3. Whether the Order of the Interstate Commerce Commission should be sustained in the absence of a finding that

the interstate freight rates and charges on bituminous coal moving to, from and within Minnesota are and would be just and reasonable for the future.

4. Whether there was a finding that the intrastate freight rates and charges as increased on bituminous coal are and would be just and reasonable for the future and, if not, whether the absence of such a finding is a fatal defect in the Report, Decision and Order of the Interstate Commerce Commission.

5. Whether there is substantial evidence in the record before the Interstate Commerce Commission to support its detailed findings including, *inter alia*, findings as to:

(a) The transportation conditions under which intrastate and interstate freight traffic was handled;

(b) the reasonableness of the increases applied on interstate freight rates and charges on bituminous coal;

(c) the increase in the railroads' revenues as a result of the increased intrastate rates and charges on bituminous coal; and

(d) that the Minnesota intrastate rates and charges on bituminous coal are abnormally low and are not contributing their fair share to the railroads' total revenues required by the railroads in order to furnish adequate and efficient railway transportation service, thereby causing undue, unreasonable and unjust discrimination against interstate commerce.

6. Whether the Examiner made erroneous rulings as to the scope of cross examination and as to the proper foundation for exhibits, and, if so, whether such erroneous rulings resulted in a denial of a fair and adequate hearing to the appellants.

7. Whether the savings clause in the Report, Findings

and Order of the Interstate Commerce Commission is sufficient to prevent the deprivation of appellants' property without due process of law as guaranteed under the Constitution of the United States since the appellants are limited therein to apply for modification of the increased intrastate freight rates and charges on bituminous coal on the sole ground that such rates and charges are not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act, thereby denying the appellants the right to obtain reparations if the increased intrastate rates and charges on bituminous coal are found to be unjust and unreasonable or otherwise unlawful—which right is protected in the general revenue proceeding involving interstate rates and charges which is the basis of this action.

## STATEMENT

Each of the coal dock companies, appellants herein, is engaged in the operation of one or more commercial coal docks at Duluth, Minnesota, and also in the assembling and distribution of coal from such docks. The preponderance of this bituminous coal is mined in the eastern fields in the United States, from which points of origin it is transported by rail to the lower Lake Erie ports. The coal is then transferred to vessels at the Lake Erie ports and moved to the upper lake commercial coal docks at Duluth, Minnesota. These coal dock companies ship by rail over one million tons of coal annually from their docks at Duluth, Minnesota, to points of destination in Minnesota.

The intervening railroad defendants herein filed a petition with the Interstate Commerce Commission pursuant to Sections 3, 13 and 15a of the Interstate Commerce Act requesting in part authority to apply the same increases on Minnesota intrastate freight rates and charges, without exceptions,

as authorized by the Interstate Commerce Commission on interstate freight rates and charges in *Ex Parte 175, Increased Freight Rates, 1951.*[2] This proceeding was identified as I.C.C. Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges.* At the time of filing this petition the Interstate Commerce Commission had granted "interim" increases on interstate freight rates and charges in the amount of 15 per cent generally. However, on bituminous coal, the Interstate Commerce Commission had approved freight rate increases of 12 per cent with a maximum holddown of 40 cents per ton. *Ex Parte 175, Increased Freight Rates, 1951,* 289 I.C.C. 395. Under the so-called single increase rule applying to rail-lake-rail transportation, the defendant railroads moving the coal in interstate commerce beyond the head-of-the-lake docks at Duluth, Minnesota, were authorized to collect one-half of the increase, to-wit: 20 cents per ton. Also, at the time of filing this petition, the Railroad and Warehouse Commission of Minnesota had held hearings on the application of these railroad defendants for authority to publish and apply on Minnesota intrastate freight rates and charges, and maintain for the future, increases to the same extent and in the same amount and proportion as increases had been authorized on corresponding interstate traffic by the Interstate Commerce Commission in *Ex Parte 175.* This state proceeding was designated as M.R.C. Docket Nos. A-7138, A-7138-1 and A-7138-2. The Railroad and Warehouse Commission of Minnesota issued a report and order dated December 1, 1952, and also a report and order dated December 30, 1953, whereby the Minnesota Commission authorized increases in Minnesota intrastate freight rates and charges to the same extent as interstate freight rates and charges

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[2]Reported at 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589; 289 I.C.C 395; 297 I.C.C. 17.

had been increased by the Interstate Commerce Commission in *Ex Parte 175*, except for a few commodities—one of which was bituminous coal.

After the filing of the railroad defendants' petition with the Interstate Commerce Commission, but prior to the hearing on said petition, the Interstate Commerce Commission issued in *Ex Parte 175* another order, dated October 15, 1955, and a later report, dated November 14, 1955, whereby the "interim" increases previously authorized on interstate freight rates and charges were permitted to become permanent and the expiration date for said "interim" increases was cancelled. *Ex Parte 175, Increased Freight Rates, 1951*, 297 I.C.C. 17. Thereafter the railroad defendants herein filed a petition with the Minnesota Commission requesting authority to apply on Minnesota intrastate freight rates and charges the same permanent increases as authorized by the Interstate Commerce Commission in *Ex Parte 175*. Subsequently, the Minnesota Commission held a hearing, which proceeding is designated as M.R.C. Docket No. A-7138-3. On December 19, 1955, the Minnesota Commission issued its Preliminary Report and Order; and on January 20, 1956, the Minnesota Commission issued its Final Report, Findings of Fact and Order therein, a copy of which is set forth in Appendix E. The Minnesota Commission authorized the same permanent increases on Minnesota intrastate freight rates and charges as were authorized on interstate freight rates and charges by the Interstate Commerce Commission in its final order in *Ex Parte 175*, except for a few commodities—one of which was bituminous coal.

Responsive to the petition filed with the Interstate Commerce Commission by the railroad defendants, a hearing was held at St. Paul, Minnesota, before Examiner Walter T. Cantrell. At said hearing the railroad defendants amended their petition, dated May 3, 1955, so as to request authority to

apply on Minnesota intrastate freight rates and charges the same permanent increases as authorized on interstate freight rates and charges by the Interstate Commerce Commission in its final order in *Ex Parte 175* since the interim increases, originally sought, had been cancelled. The examiner thereafter issued his report and recommended order which stated in part that Minnesota intrastate freight rates and charges on bituminous coal caused undue, unreasonable and unjust discrimination against interstate commerce. These coal dock companies and other protestants filed exceptions to such report and recommended order and the Interstate Commerce Commission allowed oral argument on the matter. Thereafter, the Interstate Commerce Commission made and entered its final report, decision and order dated April 23, 1957, in which it made the following ultimate findings:

"We find and conclude that:

1. The transportation conditions incident to the intrastate transportation of freight in Minnesota are not more favorable than those between Minnesota and interstate points.

2. The amount and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable.

3. The present Minnesota intrastate rates and charges on anthracite, bituminous coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs, and jack pine and aspen timber), and sugar beets are abnormally low and are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, thus accomplishing the purposes of the act, as set forth in the national transportation policy declared by the Congress, that the burden thus cast upon the interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be if augmented by

the increases authorized generally on the same commodities in Ex Parte No. 175, and that these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Minnesota intrastate rates on the commodities in issue herein the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Minnesota and adjoining States under our authorization in Ex Parte No. 175, provided, however, that increases may not be made which result in levels of rates and charges higher than the general levels of interstate rates and charges maintained on like traffic for movements to and from points in Minnesota.

5. The establishment of increased intrastate rates and charges as provided in finding 4 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, will increase the respondents' revenue substantially, and will provide not more than a just proportion of the respondents' total railway operating income.

6. The increased revenues to the respondents which will result from increased rates and charges as provided in finding 4 are required from intrastate traffic in Minnesota in order to enable the respondents to furnish adequate and efficient railway transportation service." *Minnesota Intrastate Freight Rates and Charges*, 300 I.C.C. 201.

The said report, decision and order of the Interstate Commerce Commission contains the following provision:

"An order carrying into effect the foregoing findings and conclusions will be entered, unless this Commission is notified by the Minnesota Commission within 30 days from the service of this report that the State Commission will permit the increases required to remove the unlawfulness herein found to exist."

These coal dock companies filed with the Interstate Commerce Commission a petition for reconsideration, re-argument and postponement of compliance date, which petition was denied by order dated July 23, 1957. On May 20, 1957, the Minnesota Commission entered and issued a Report and Order (Appendix C) authorizing the establishment and imposition of increases on Minnesota intrastate freight rates and charges for the commodities previously excepted from said increases, including bituminous coal, in accordance with the said report, decision and order of the Interstate Commerce Commission.

Thereafter the coal dock companies as plaintiffs instituted this action in the court below. On June 27, 1957, the United States District Court issued an order (Appendix F hereto) temporarily restraining the effective date of the aforesaid orders in so far as said orders pertained to the Minnesota intrastate freight rates and charges for bituminous coal. On July 12, 1957, the District Court issued an order permitting several railroads to intervene and become party defendants; and, thereafter, on August 12, 1957, the Court issued its order permitting Diamond Match Company to intervene and become a party plaintiff.

After hearing oral argument in this action, the court below rendered its decision holding that the plaintiffs (the coal dock companies) and the intervening plaintiff had not sustained "their right to a decree suspending, enjoining, setting aside and restraining the enforcement, application and operation of the order of the Interstate Commerce Commission in Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges*, pursuant to which the order of the Minnesota Commission of May 20, 1957, in its Docket No. A-7138-3 was issued." Subsequently, the complaint and intervening complaint was dismissed and the temporary injunction was vacated and set aside.

Application, under date of January 25, 1958, was then made to Mr. Justice Whittaker for stay of the order of the three-judge United States District Court and for continuance or reinstatement of the temporary injunction, or, in the alternative, for injunction pending decision by this Court on appeal.

On January 31, 1958, Mr. Justice Whittaker entered the following order:

> "Appellants' application for a stay and for continuance or reinstatement of temporary injunction, or, alternatively, for an injunction, is denied, without prejudice to renew in the event this Court shall note probable jurisdiction of this appeal, or postpone further consideration thereof to a hearing on the merits."

Effective January 26, 1958, the freight rates on bituminous coal within Minnesota via intrastate routes were increased 20 cents per net ton.

## THE QUESTIONS ARE SUBSTANTIAL

The court below in a *per curiam* decision upheld the report and order of the Interstate Commerce Commission and rejected appellants' contentions that (a) the findings of the Commission are inadequate, and (b) the evidentiary basis for the findings of the Commission is inadequate. The Court appears to have overlooked appellants' contention that certain essential findings were omitted by the Interstate Commerce Commission in its report, decision and order below (300 I.C.C. 201).

It is felt that the issues can most clearly be presented to this Court by specific treatment of the findings by, and evidence before, the Interstate Commerce Commission below. Appellants respectfully but emphatically must except to the opinion of the court below for the reasons hereinafter set forth.

### 1. Inadequacy of Commission's Revenue Findings.

(a) The Interstate Commerce Commission made a finding that the establishment of the increased intrastate rates and charges "will provide not more than a just proportion" of the revenues required by the railroad appellees herein. However, the Interstate Commerce Commission failed to make a finding as to the total amount of revenues required by the railroad defendants to render adequate and efficient railway transportation service. In order to ascertain whether or not the amount to be contributed by the increased intrastate rates on bituminous coal is a just and fair proportionate part of the total railway revenues required by the railroad defendants to operate efficiently, it is necessary to know what total amount is required by the railroad defendants to operate efficiently. A finding as to the justness and fairness of a proportionate part of an unknown total is meaningless.

The rationale for the above argument was recently adopted by the United States Supreme Court in another Section 13 case entitled *Chicago, Milwaukee, St. Paul, and Pacific Railroad Co. v. State of Illinois*, 78 S.Ct. 304, decided on January 13, 1958 (hereinafter referred to as the *Milwaukee case*). The *Milwaukee case* involved an order of the Interstate Commerce Commission increasing intrastate passenger fares for the Milwaukee Road's Chicago suburban commuter service. In that case, the Interstate Commerce Commission found that the Milwaukee Road's 1954 passenger revenues from the Chicago suburban commuter service were less, by an amount of $306,038, than the out-of-pocket cost of the service and concluded therefrom that the existing intrastate fares caused undue discrimination against interstate commerce. To remove this discrimination the Interstate Commerce Commission prescribed increased intrastate fares which were to pro-

duce additional annual revenue in the amount of $383,000, an amount sufficient to eliminate the out-of-pocket loss and also to contribute $77,000 toward indirect costs and taxes. The District Court set aside the Interstate Commerce Commission's order on the basis that the Interstate Commerce Commission failed to make findings necessary to support an order under Section 13(4) of the Interstate Commerce Act. The United States Supreme Court affirmed the order of the District Court and stated in footnote 8 as follows:

> "We agree with the District Court that that portion of the prescribed increases designed to produce $77,000 annually as a contribution to indirect costs and taxes is not based upon adequate findings. There is no finding of the total of indirect costs and taxes to which contribution is to be made, nor any finding from which we may infer how the Interstate Commerce Commission derived its conclusion that a $77,000 contribution was fair. *It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what the something else is.*" (Emphasis added.) (78 S.Ct. 304, 310.)

Although in the *Milwaukee case* the Interstate Commerce Commission couched its finding as to contribution in terms of out-of-pocket loss and indirect costs and taxes while in the instant case, in terms of revenues required by the railroads, the Court's criticism of the Interstate Commerce Commission's order in the *Milwaukee case* is equally applicable in the instant case. Here, there is no finding as to the total revenues required by the railroad defendants to operate efficiently and, therefore, it is impossible to ascertain whether or not the revenues allegedly to be derived from the increased intrastate rates on bituminous coal will contribute not more than a just proportion of the total revenues required by the railroad defendants to furnish adequate and efficient railway transportation service.

(b) In the *Milwaukee case,* the Interstate Commerce Commission did make a finding that the higher rates which it prescribed would eliminate an annual out-of-pocket loss of $306,000 on the suburban traffic and also contribute approximately $77,000 annually to indirect costs and taxes. However, in the instant case, the Interstate Commerce Commission did not even make a finding as to the amount of revenue, or additional revenue, if any, which the increased intrastate rates *on bituminous coal* would produce annually. The Interstate Commerce Commission merely found that the establishment of increased intrastate rates on all excepted commodities will increase the railroads' revenues substantially. Furthermore, the Interstate Commerce Commission did not make a finding as to the amount of revenue from intrastate shipments of bituminous coal which would constitute a fair proportion of the total railway operating income of the railroad defendants. Without findings as to the amount of revenue to be derived from, and the fair proportion of revenue to be contributed by, Minnesota intrastate freight rates and charges on bituminous coal, there is no justification for the ultimate finding that such increased rates "will provide not more than a just proportion" of the total revenues required by the railroad defendants. In fact the Interstate Commerce Commission has merely found that an unknown amount to be derived from increased intrastate rates will provide not more than a just proportion of another unknown amount—total railway operating income.

(c) Furthermore, the Interstate Commerce Commission did not make a finding that the then existing intrastate freight rates on bituminous coal, in view of the Minnesota intrastate railroad operations as a whole, constituted undue revenue discrimination against interstate commerce. In fact, the Interstate Commerce Commission failed to make findings as to the total amount of revenue received by the rail-

road defendants from the entire movement of intrastate traffic in Minnesota and as to the contribution from Minnesota intrastate traffic which would constitute a fair proportion of the railroad defendants' total operating income.

In the recent Section 13 case entitled *Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. State of Illinois, et al.*, supra, this Court stated as follows:

> "It should also be noted that in *King v. United States, supra*, the Court adverted to those very factors among the ICC's findings whose absence in the present case we find to be a fatal defect. The Court there emphasized the ICC finding that the entire intrastate traffic, freight and passenger, constituted a revenue drain upon the carrier's revenues from interstate traffic. Since the Commission has not in this case found whether or not the commuter rates, viewed in the light of the intrastate operation as a whole, constitute an undue revenue discrimination against the Milwaukee Road's interstate operations, the judgment of the District Court in remanding the case to the Commission for further consideration must be affirmed." (78 S.Ct. 304, 310.)

As shown above, the Interstate Commerce Commission in the instant case failed to make the finding required in the above *Milwaukee case*, and, therefore, the District Court erred in sustaining the report, decision and order of the Interstate Commerce Commission.

It is important to note that in the *Milwaukee case* only one railroad was involved while in the instant case nineteen railroads are involved. Under the circumstances in the instant case, each railroad should be required to present evidence showing its entire intrastate operation in Minnesota. It seems reasonable to assume that the intrastate operation of all nineteen railroads are not identical. To the extent that all nineteen railroads do not move bituminous coal in Minnesota intrastate traffic, it is obvious that there should also be findings as to the intrastate operation of each railroad.

Otherwise, it would be impossible to ascertain whether or not the intrastate rates on bituminous coal are actually a factor causing undue, unjust or unreasonable discrimination against interstate commerce. It might well be that the entire intrastate operation of each railroad moving bituminous coal in intrastate traffic does not constitute a "revenue drain" upon each carrier's interstate operation and that the entire intrastate operations of the other railroads, or some of them, do constitute such a drain. Obviously, in an action pertaining to intrastate rates on bituminous coal, evidence showing only the intrastate operation of all nineteen railroads as a group would be insufficient. It is imperative that there be findings as to the entire intrastate traffic—freight and passenger—for each railroad moving bituminous coal in order to determine whether or not, in the light of the intrastate operation of such railroads, the intrastate rates on bituminous coal cause undue, unjust or unreasonable revenue discrimination against the interstate operations of such railroads. According to the decision in the *Milwaukee case*, it would appear that such individual findings as to each railroad are required in the instant case where all intrastate freight rates and charges are not involved but only the intrastate freight rates and charges on a few commodities not shown to be moved by all nineteen railroads.

Although both the *Milwaukee case* and the instant case are Section 13 cases, the increase sought on commuter fares in the *Milwaukee case* was not based on a prior general revenue proceeding such as in the instant case. Furthermore, the *Milwaukee case* involved commuter passenger fares and the instant case involves freight rates on particular commodities. The appellants, however, respectfully submit that the findings required in the *Milwaukee case* should also be required in the instant case. The determination of this question is of extreme importance not only to these appellants, but to ship-

pers throughout the United States in view of the numerous general revenue proceedings, such as *Ex Parte No. 175*, initiated by the railroads in recent years.

### 2. Inadequacy of the Evidence as to Railroad Revenues.

As previously shown, the United States Supreme Court in the *Milwaukee case, supra*, held that to sustain an ultimate finding of the Interstate Commerce Commission in a Section 13 case that certain intrastate rates cause undue, unjust or unreasonable discrimination against interstate commerce, there must also be a subsidiary finding that such rates, viewed in the light of the intrastate operation as a whole, constitute an undue revenue discrimination against the railroad's interstate operations. In the *Milwaukee case* the Supreme Court stated as follows:

> "A fair picture of the intrastate operation, and whether the intrastate traffic unduly discriminates against interstate traffic, is not shown, in this case, by limiting consideration to the particular commuter service in disregard of the revenue contributed by the other intrastate services." (78 S. Ct. 304, 309).

What type of evidence is required in a Section 13 case to show a fair picture of the intrastate operations of the railroads?

In the instant case there is no evidence whatsoever showing the intrastate revenues from Minnesota traffic, freight or passenger. The railroad defendants merely introduced an exhibit which showed only *the total system operating revenues and total system operating expenses* for thirteen of the nineteen railroad defendants during the first eleven months of 1954 and 1955. There is no evidence in the record which discloses the Minnesota intrastate operating revenues and expenses for all nineteen railroad defendants either as a group or individually.

The coal dock companies respectfully contend that since the record in the instant case is devoid of any evidence showing the revenues from the Minnesota intrastate operations of the railroad defendants, either as a group or individually, there is no substantial evidence to support the necessary subsidiary finding required by the *Milwaukee case.* Therefore, the report and order of the Interstate Commerce Commission should be annulled, set aside and the injunction should be reinstated.

Such an important question—what evidence is required to support the necessary subsidiary finding in a Section 13 case—should be determined once and for all by the Supreme Court of the United States so that the Interstate Commerce Commission, state commissions, the Courts and private parties will have a proper guide to follow in Section 13 cases. In the instant case nineteen railroads were involved, but the evidence does not disclose which of the nineteen railroads actually moved bituminous coal in significant quantities, or at all, in Minnesota intrastate traffic. Under such circumstances should there be evidence showing only the total revenues, costs and expenses for Minnesota intrastate traffic of all nineteen railroads as a group, or should there also be evidence showing the revenues, costs and expenses for Minnesota intrastate traffic of each railroad shipping bituminous coal in Minnesota intrastate traffic in order to determine whether or not the intrastate rates on a single commodity, such as bituminous coal, viewed in the light of the intrastate operation as a whole, cause undue, unjust or unreasonable revenue discrimination against railroad operations in interstate commerce. The question has not heretofore been decided by the Supreme Court of the United States.

### 3. Inadequacy of Interstate Commerce Commission Findings With Respect to the Interstate Rates on Bituminous Coal.

In order to justify a finding that intrastate rates cause unjust discrimination against interstate commerce, it is essential that the Interstate Commerce Commission make a finding that the interstate rates are just and reasonable. In *Georgia Comm. v. U. S.*, 283 U.S. 765, 770, the court held as follows:

> "It is true that when state rates are assailed on the ground that they result in undue discrimination against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level."

The Interstate Commerce Commission has consistently followed the above rule of law enunciated by the Supreme Court of the United States. *Jacksonville Chamber of Commerce v. A & W P*, 211 I.C.C. 509, 513; *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637, 669.

In approving the general rate increases in *Ex Parte 175, Increased Freight Rates, 1951*, 289 I.C.C. 395; 297 I.C.C. 17—which general revenue proceeding was the basis for this Section 13 case, the Interstate Commerce Commission stated that the rates increased as permitted were not considered as prescribed rates within the meaning of *Arizona Grocery Company v. A. T. & S. F. Ry. Co.*, 284 U.S. 370. The effect of that savings clause is that although the general increases were found to be reasonable, particular increased rates were not thereby found to be just and reasonable. *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637, 669.

The interstate rates on bituminous coal moving to, from and within Minnesota are not prescribed rates and are not maintained by order of the Interstate Commerce Commis-

sion. Therefore, the present interstate rates applicable to bituminous coal are merely legal rates being published as required by Section 6 of the Interstate Commerce Act and are not necessarily just and reasonable rates. *Arizona Grocery Company v. A. T. & S. F. Ry. Co.*, 284 U.S. 370.

In the instant case there is only a finding that "the amounts and percentages by which interstate rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable." Whether this finding is equivalent to a finding that the increased interstate rates are just and reasonable is a question of substantial importance in view of the several general revenue proceedings recently initiated by the railroads before the Interstate Commerce Commission and also the several Section 13 proceedings initiated by the railroads in order to increase intrastate rates after a general revenue proceeding. The appellants respectfully contend that it is not! However, if it is, the appellants further contend that there is no substantial evidence to support the finding that the interstate rates on bituminous coal moving between points in Minnesota and points in other states are just and reasonable.

The railroad petitioners in the Section 13 proceeding before the Interstate Commerce Commission had the burden of proving *in this record* that the interstate rates on bituminous coal from, to and within Minnesota were just and reasonable. *Interstate Commerce Commission v. Louisville & Nashville R. R.*, 227 U.S. 88, 93-94. That proof was not met by reference to *Ex Parte 175* wherein, as shown above, the Interstate Commerce Commission explicitly pointed out they were not, in that revenue proceeding, passing upon the justness or reasonableness of individual rates.

### 4. Inadequacy of the Interstate Commerce Commission's Findings With Respect to the Intrastate Rates on Bituminous Coal.

The Interstate Commerce Commission does not have authority under any circumstances to raise intrastate rates above a reasonable level. *Georgia Comm. v. United States*, 283 U.S. 765, 770. Therefore, it must necessarily follow that in a Section 13 case the Interstate Commerce Commission is required to make a finding, based upon substantial evidence, that the increased intrastate rates are, and in the future will be, just and reasonable. In the instant case the Interstate Commerce Commission made the following findings:

> "4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Minnesota intrastate rates on the commodities in issue herein the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Minnesota and adjoining States under our authorization in Ex Parte No. 175, provided, however, that increases may not be made which result in levels of rates and charges higher than the general levels of interstate rates and charges maintained on like traffic for movements to and from points in Minnesota.
>
> "5. The establishment of increased intrastate rates and charges as provided in finding 4 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, will increase the respondents' revenue substantially, and will provide not more than a just proportion of the respondents' total railway operating income."

It has been previously contended by the appellants that there was no finding or evidence that the interstate freight rates and charges on bituminous coal are, and for the future would be, just and reasonable. Furthermore, there is no finding or substantial evidence that the relationship between

Minnesota interstate and intrastate freight rates and charges on bituminous coal was reasonable prior to the *Ex Parte 175* general increase on the interstate rates and charges. Therefore, the appellants respectfully submit that in view of the absence of findings and evidence as to the reasonableness of the interstate rates on bituminous coal and also as to reasonableness of the prior relationship between Minnesota interstate and intrastate rates on said commodity, the Interstate Commerce Commission's ultimate finding 5—that the increased intrastate rates on bituminous coal will not result in unreasonable rates or charges in relationship to interstate rates and charges on bituminous coal—is not supported by the necessary preliminary findings or supporting evidence. The absence of such findings and evidence constitutes a fatal defect in the Interstate Commerce Commission's order.

Furthermore, appellants submit that there is no finding that the increased intrastate freight rates and charges on bituminous coal are, and in the future will be, just and reasonable. A finding that the establishment of increased intrastate rates and charges in the same manner as for interstate rates will not result in unreasonable rates or charges is not equivalent to a finding that the increased intrastate rates and charges on bituminous coal are, and in the future will be, just and reasonable. The intrastate rates and charges themselves must be the subject of the finding that they are just and reasonable for the present and will be just and reasonable for the future.

### 5. Unlawful Usurpation of State Commission Jurisdiction Herein by the Interstate Commerce Commission.

In recent years the railroads in the United States have requested the Interstate Commerce Commission more and more frequently for general revenue increases and, thereafter, have initiated more and more Section 13 cases in which the railroads, as here, present brief summaries of system financial statistics for railroads in toto and rely heavily on the prior general revenue increase granted to them on interstate traffic by the Interstate Commerce Commission. The role played by the state agencies, whose primary duty it is to establish intrastate rates and charges, has been regarded by the Commission and the railroads as very minor, if not perfunctory, in this rate making process. It is for these reasons that appellants request the Court to condemn as wholly inadequate the type of evidence submitted by the railroads in this Section 13 case and relied upon by the Interstate Commerce Commission in usurping the functions of the Minnesota Railroad and Warehouse Commission.

(a) As to the finding that "the transportation conditions incident to the intrastate operation of freight in Minnesota are not more favorable than those between Minnesota and interstate points," there is no evidence that the transportation conditions, under which bituminous dock coal moves in interstate and intrastate traffic, are substantially identical with respect to all factors bearing on the reasonableness of rates. The railroad defendants did introduce testimony that interstate and intrastate shipments were intermingled on the same trains, whether local or through freight trains. However, such evidence is not sufficient to justify the Interstate Commerce Commission's action in prescribing intrastate rates. *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341.

(b) As to the finding that "the amounts and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte 175 are just and reasonable," there is absolutely no evidence *in this record* which supports this finding in regard to bituminous coal. *Interstate Commerce Commission v. Louisville & Nashville R. R.*, 227 U.S. 88, 93-94.

(c) As to the finding that the increased intrastate rates and charges will substantially increase the revenues of the railroad defendants, the appellants contend that the substantial evidence of record is exactly to the contrary. For example, major consumers testified that if the intrastate rates on bituminous coal from the Duluth commercial coal docks of appellants were increased as proposed, such consumers would either truck the coal or use some other competitive fuel. Several coal dock operators testified that under such conditions they would, to a substantial degree, displace rail transportation of bituminous coal by truck transportation. The uncontroverted revenue loss of the railroads on coal proved by the coal companies is set forth in Appendix G. Although this composite statement of revenue loss to the railroad defendants (Appendix G) may contain some duplication by reason of the fact that some of the shippers diverting to motor carrier transportation may be supplying utility consumers who no longer will be using coal or who will be using some other means of transportation, the statement conclusively shows that if the intrastate freight rates and charges on bituminous coal are increased as proposed, the railroad defendant will lose, rather than gain, revenue. The evidence submitted by the railroad defendants shows that if the increase had been allowed in 1954 on intrastate freight rates and charges on bituminous coal *and if the same volume of bituminous coal had been shipped*

*by rail in 1954* in Minnesota intrastate traffic, the railroad defendants would have realized only approximately $200,000 in additional revenue. The amount of revenue hoped to be gained is far less than the amount to be lost by the railroad defendants, as shown on Appendix G, and, therefore, the finding is not supported by substantial evidence. *Mississippi Public Service Commission v. United States,* 124 F. Supp. 809, 816 (S.D. Miss. 1954) (affirmed 349 U.S. 908).

(d) As to the finding that the Minnesota intrastate rates and charges on bituminous coal are abnormally low and are not contributing their fair share to the railroads' total revenues required by the railroad defendants, the appellants submit that there is no substantial evidence in the record to support this finding. *The railroad defendants failed to present one iota of evidence relating to the costs and expenses incurred by them for the movement of bituminous coal in Minnesota intrastate traffic.* On the other hand, the coal dock companies introduced evidence showing the high level of earnings on the Minnesota intrastate rates on bituminous coal. For one example, the evidence shows that the average revenue per ton mile derived from intrastate transportation of bituminous coal by rail in Minnesota, based on the then existing rates, is substantially greater than the average revenue per ton mile derived from all commodities transported by Class I railroads in both the Western District and for the United States as a whole. Obviously, the Interstate Commerce Commission's finding was based on a mere disparity between interstate and intrastate rates and charges on bituminous coal, which is not a sufficient basis for the finding. *State of North Carolina v. United States,* 325 U.S. 507, 516. *Florida v. United States,* 282 U.S. 194, 211-212.

In view of the limited and cursory presentation of evidence by the railroad defendants in the instant case, which

evidence was relied upon by the Interstate Commerce Commission in prescribing increased intrastate rates, the appellants respectfully submit that this Court upon review of the record in the instant case will determine that the railroad defendants did not fulfill their burden of proof. The establishment of intrastate rates and charges is primarily the duty of the state commission to which such duties have been delegated by the state legislature. *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Illinois*, 78 S.Ct. 304, 307-308; *Mississippi Public Service Commission v. United States*, 124 F. Supp. 809 (S.D. Miss. 1954) (aff'd 349 U.S. 908). The jurisdiction of the Interstate Commerce Commission over intrastate freight rates and charges is limited and the Interstate Commerce Commission should not be permitted to exercise such jurisdiction unless the evidence of record clearly warants it to do so. Such was not the case here.

### 6. Prejudicial Errors of the Interstate Commerce Commission as to Admissibility of Evidence and Scope of Cross Examination.

In the instant case Exhibits 13 and 14 were received in evidence over the objections of the coal dock companies. In its report, decision and order the Interstate Commerce Commission relied heavily upon these exhibits in support of its findings. Exhibits 13 and 14 are merely summaries of certain data accumulated by six railroads, pursuant to the directions of Mr. G. A. Richardson, Assistant Comptroller of the Great Northern Railway Company. The information shown on Exhibits 13 and 14 was obtained from various sources which were not available to the coal dock companies—such as Recordak films of waybills, wheel reports, conductors' reports, etc. The railroad defendants refused to make available or introduce in evidence the underlying data for Exhibits 13 and 14, and these coal dock companies were denied their

right to check the accuracy of the summaries shown in these exhibits.

It was indeed very important for the coal dock companies to have an opportunity to examine the underlying data for Exhibits 13 and 14. For example, Exhibit 31 shows that the six railroads did not include all compensation paid crews on the trains included in said exhibits; that the rate of pay for members of a through train is converted to the rate of pay for members of a local train under two circumstances; and that only scheduled trains were included in these exhibits. An examination of the underlying data for these exhibits was necessary in order to ascertain not only the correctness of the exhibits but the effect of the excluded data since the railroad defendants were attempting to prove by these exhibits that local service was more costly than through service; that, although more interstate traffic than intrastate traffic moved in both local and through trains, a larger proportion of the intrastate traffic moved in local trains; and that, therefore, intrastate traffic was more costly than interstate traffic.

The coal dock companies respectfully contend that the admission of Exhibits 13 and 14 constituted prejudicial error since said exhibits were clearly hearsay and that the underlying data was not in evidence or ever produced in the hearing room. *Zemp Construction Co. v. Harmon Bros. Construction Co.*, 225 S.C. 361, 82 S.E.2d 531 (1954); *Lemon v. United States*, 164 Fed. 953 (8th Cir. 1908); *Wigmore on Evidence* (2nd Ed.), Sec. 1230; 32 *C.J.S., Evidence*, Sec. 698. In the case of *Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 80 F.2d 32, 44 (8th Cir. 1935), the Court stated the rule as follows:

> "While, under certain limitation, an expert may give a summary of his examination of voluminous records, if proper foundation had been laid with reference to such

records so as to make them competent evidence, still to be admissible the records must at least be produced and be made available to the opposite party for the purpose of cross examination. Ordinarily, the rule is one of convenience which goes no further than to permit a summary of the mass of records otherwise in evidence, or at least admissible in evidence and actually produced in court."

The coal dock companies also contend that they were not permitted by the Examiner to cross-examine certain witnesses who testified in support of Exhibits 13 and 14 as to the underlying data which they had in their possession. Furthermore, the coal dock companies contend that the railroad defendants resisted their every attempt to cross-examine the witnesses as to the underlying data and instructions for the preparation of these exhibits (T. pgs. 263-264, 269-270, 287-292, 293-297, 305-313, 436-437, 440-444, 445-451). Thus appellants were, in flagrant fashion, denied the right "to conduct such cross examination as may be required for a full and true disclosure of the facts," as granted by the Administrative Procedure Act, 5 U.S.C. 1006(c), and the curtailment of cross examination of these witnesses constituted prejudicial error. *Reilly v. Pinkus*, 338 U.S. 269, 275 (1949); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275, 277 (5th Cir. 1951); *Powhatan Mining Co. v. Ickes*, 118 F.2d 105, 109 (6th Cir. 1941).

It is an accepted doctrine that the strict common law rules of evidence do not apply to administrative hearings. However, a multitude of erroneous rulings as to the admissibility of evidence may result in the denial of a fair hearing even though form is observed. *Viannopoulos v. Robinson*, 247 F.2d 655 (7th Cir. 1957). The receipt of Exhibits 13 and 14 —all of which were hearsay—without proper foundation and the curtailment of cross examination of the witnesses who prepared Exhibits 13 and 14 were highly prejudicial to the

coal dock companies and rendered the hearing unfair. The rights of the individual shipper should be protected in the rapidly developing domain of the Interstate Commerce Commission over intrastate rates. The Court, in reviewing this question, should set forth standards to be followed by the Interstate Commerce Commission in admitting summaries of data in evidence, but at the same time protecting the right of cross examination in Interstate Commerce Commission proceedings.

### 7. Savings Clause Is Insufficient to Prevent Deprivation of Property Without Due Process of Law.

As previously shown, the coal dock companies, appellants herein, contend that there is no finding, or evidence warranting a finding, that the interstate freight rates and charges on bituminous coal moving to, through or within Minnesota are just and reasonable. It is fundamental that a carrier is entitled only to a just and reasonable rate. *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426.

The action of the Interstate Commerce Commission in ordering intrastate rates on bituminous coal to be increased to the interstate level without first determining that the interstate rates are just and reasonable raises a vital question that has serious implications for the coal dock companies. If, upon subsequent challenge by formal complaint to the Interstate Commerce Commission, the increased interstate rates on bituminous coal are found to be unjust and unreasonable, the shippers will be allowed reparations for the exaction of unjust and unreasonable rates. *Interstate Commerce Act*, Section 16(1), 49 U.S.C. 16(1). However, if, upon subsequent challenge by formal complaint to the Interstate Commerce Commission, the increased *intrastate* rates on bituminous coal are found to be unjust and unrea-

sonable, under the theory of the commission and the Court below, the coal companies would be denied the right to claim reparation for the exaction of unjust and unreasonable rates which had been prescribed by the Interstate Commerce Commission. This is because the Commission and the Court below appear to be treating the increased intrastate rates for application within Minnesota as *prescribed* rates. *Arizona Grocery Company v. A. T. & S. R. Co.*, 284 U.S. 370. The coal companies also would be denied the right to claim reparations by action before the Minnesota Railroad and Warehouse Commission for the exaction of unjust and unreasonable rates which have been prescribed by the Interstate Commerce Commission. *Pennsylvania Railroad v. Illinois Brick Company*, 297 U.S. 447.

The right to a reasonable rate is a vested property right of the shipper. *McLean Lumber Co. v. United States*, 237 Fed. 460 (E.D. Tenn. 1916); *Missouri K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (E.D. Mo. 1908). Under the decision in the instant case it appears that the interstate rates on bituminous coal as increased by Ex Parte 175 are to be merely legal rates and the intrastate rates on bituminous coal as increased are to be prescribed rates. These coal dock companies then will be deprived of their fundamental right to ship their coal under reasonable intrastate rates unless the Interstate Commerce Commission is required to make a finding supported by substantial evidence in this record that the increased interstate rates on bituminous coal—to which level the intrastate rates were increased—are in fact just and reasonable; and the coal dock companies will be without legal redress for reparations if the increased intrastate rates, being prescribed rates, are later found to be unjust and unreasonable.

In the instant case the Interstate Commerce Commission included the following savings clause in its report and order:

> "The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Minnesota, or of any interested party, to apply for modification thereof as to any individual rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act." (330 I.C.C. 201, 224.)

It is indeed an important question whether or not this savings clause is sufficient to prevent the deprivation of property without due process of law as guaranteed under the fifth amendment to the Constitution of the United States since the coal dock companies, under the decisions appealed from, would be limited to apply for modification of the increased intrastate freight rates and charges on bituminous coal on the sole ground that such rates and charges are not related to the interstate rates and charges on like traffic in such a way as to contravene the provision of the Interstate Commerce Act.

## CONCLUSION

For the reasons stated, the questions presented by this appeal are so substantial and of such public importance as to require plenary consideration by the Supreme Court of the United States, with briefs on the merits and oral argument, for their resolution. It is respectfully submitted that probable jurisdiction should be noted and that the relief sought in the application herein to Mr. Justice Whittaker by these appellants under date of January 25, 1958, should now be granted.

Respectfully submitted,

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# APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action No. 5815

North Western-Hanna Fuel Co.,
Berwind Fuel Company
Carnegie Dock and Fuel Company,
Inland Coal & Dock Company,
Division of the North American
Coal & Dock Company,

Plaintiffs,

and

Diamond Match Company,

Intervening Plaintiff,

vs.

United States of America,
Interstate Commerce Commission,

and

Railroad and Warehouse Commission
of the State of Minnesota,

Defendants,

and

Canadian National Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Chicago, Rock Island and Pacific Railroad Company,
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Duluth & Northeastern Railroad Company,
Duluth, Missabe and Iron Range Railway Company,
Duluth, Winnipeg and Pacific Railway Company,
Great Northern Railway Company,
Illinois Central Railroad Company,
Minneapolis & St. Louis Railway Company,
Minneapolis, Anoka and Cuyuna Range Railroad Company,
Minneapolis, Northfield and Southern Railway
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company,
Minnesota, Dakota & Western Railway Company,
Minnesota Western Railway Company,
Northern Pacific Railway Company,

Intervening Defendants.

## DECISION

Mr. Leonard E. Lindquist, Minneapolis, Minnesota, and Mr. John F. Donelan, Washington, D. C. (Messrs. Larson, Loevinger, Lindquist, Freeman & Fraser, Minneapolis, Minnesota, of counsel) for plaintiffs;

Miss Louise A. Herou, Minneapolis, Minnesota (Messrs. Larson, Loevinger, Lindquist, Freeman & Fraser, Minneapolis, Minnesota, of counsel) for intervening plaintiff;

Mr. Victor R. Hansen, Assistant Attorney General, and Mr. James E. Kilday and Mr. Robert S. Burk, Attorneys, Department of Justice, Washington, D.C., and Mr. George E. MacKinnon, United States Attorney, St. Paul, Minnesota, for the United States of America;

Mr. Robert W. Ginnane, General Counsel, and Mr. Samuel R. Howell, Associate General Counsel, Interstate Commerce Commission, Washington, D. C., for Interstate Commerce Commission;

Mr. G. F. Bennet, Mr. L. C. Corcoran, Mr. Ross L. Thorfinnson and Mr. Charles H. Clay, Minneapolis, Minnesota, Mr. F. B. Stevens, Duluth, Minnesota, and Mr. Warren H. Ploeger, Mr. Frank S. Farrell, Mr. L. E. Torinus and Mr. Curtis H. Berg, of St. Paul, Minnesota, for intervening defendants.

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Before SANBORN, Circuit Judge, and NORDBYE and BELL, District Judges.

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PER CURIAM.

This is an action to enjoin compliance with a determination of the Interstate Commerce Commission (hereinafter called the Commission) made on April 23, 1957, in Docket No. 31798, entitled *Minnesota Intrastate Freight Rates and Charges*, together with an order of the Minnesota Railroad and Warehouse Commission entered May 20, 1957, in its Docket No. A-7138-3, which gave effect to the Commission's determination. The jurisdiction of this Court is based upon Sections 1336 and 2321-2325 of Title 28, United States Code.

The plaintiffs are corporations engaged in the operation of coal docks at Duluth, Minnesota, and in the gathering and distribution of bituminous coal, more than one million tons of which are shipped annually from those docks by rail to points in Minnesota.

The Diamond Match Company, intervening plaintiff, operates a plant at Cloquet, Minnesota, and is engaged in making and selling clothes pins and matches, made from forest products shipped to it from Minnesota points, and classified for tariff purposes as short logs or wood bolts.

It is only the intrastate rates on bituminous coal, short logs, and wood bolts which are involved in this action.

The effect of the Commission's determination and the order of the Minnesota Commission, which is challenged by the plaintiffs, including the Diamond Match Company, is to require the railroads operating in Minnesota to apply to the Minnesota intrastate freight rates and charges on certain commodities, including bituminous coal, wood bolts, and short logs, "the same respective increases as are, and for the future may be, maintained by respondents [railroad] on like interstate traffic between points in Minnesota and adjoining States under our [the Commission's] authorization in Ex Parte No. 175" (Increased Freight Rates 1951, 280 I.C.C. 179; 281 I.C.C. 557, 284 I.C.C. 589, 289 I.C.C. 395, and 297 I.C.C. 17).

In Ex Parte 175, Increased Freight Rates 1951, the Class I railroads of the United States asked for over-all increases in interstate freight rates. Hearings were held by the Commission throughout the United States and evidence taken, on the basis of which the Commission granted general increases in interstate rates upon finding that the railroads needed added revenue to enable them to meet increased operating expenses.

In determining what the rate increases should be to provide the additional revenue needed, the Commission assumed that intrastate rates would be increased to the same extent as interstate rates. Because of the relation of intrastate rates to the needed revenue, the Commission invited the cooperation of state regulatory bodies. A committee appointed by the National Association of Railroad and Utili-

ties Commissioners sat with the Commission and concurred generally in its report. (Page 441 of 289 I.C.C.)

The Class I railroads operating in Minnesota asked for authority from the Minnesota Commission to apply increases in their intrastate rates and charges corresponding to those applicable on interstate shipments. The Minnesota Commission authorized most of the increases applied for, but excepted those on certain commodities, including bituminous coal, wood bolts, and short logs, the intrastate rates on which were determined by it to be adequate. The Minnesota Commission was also of the opinion that to increase the rates on these commodities would result in the diversion of traffic in these commodities from the railroads.

The railroads on May 9, 1955, filed a petition with the Commission asserting that the Minnesota Commission had refused to permit increases in intrastate rates with respect to the commodities excepted by that Commission from the intrastate rate increase allowed; that the rates the railroads were required to maintain intrastate for such commodities were causing and would cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and on interstate commerce, on the other hand, and undue, unreasonable and unjust discrimination against interstate commerce, in violation of Section 13 of the Interstate Commerce Act (49 U.S.C. §13).

The railroads also alleged, in substance, in their petition that to the extent of the denial by the Minnesota Commission of their request for authority to increase intrastate rates they were deprived of revenue to which they were lawfully entitled and which the Commission had determined it was necessary for them to have in order to furnish the adequate and efficient transportation service contemplated by Section 15a (2) of the Act (49 U.S.C. §15a(2)).[1]

[1] "(2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Upon the filing of the petition, the Commission, under Section 13 (3) and (4) of the Act (49 U.S.C. §13 (3) and (4)), instituted an investigation concerning the lawfulness of the Minnesota intrastate freight rates and charges with respect to the commodities excepted by the Minnesota Commission. The railroads were made respondents in the proceeding. The State of Minnesota, the Minnesota Commission, and others interested, including the plaintiffs in this action, intervened in opposition to the railroads' petition.

The matter was assigned for hearing before an Examiner of the Commission and was heard in St. Paul, Minnesota, in January of 1956. The Examiner issued his report, to which exceptions were filed, and with respect to which briefs were submitted and oral arguments presented before the entire Commission. In its report and decision of April 23, 1957, the Commission made the following ultimate findings and conclusions:

"1. The transportation conditions incident to the intrastate transportation of freight in Minnesota are not more favorable than those between Minnesota and interstate points.

"2. The amounts and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable.

"3. The present Minnesota intrastate rates and charges on anthracite, bituminous coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs, and jack pine and aspen timber), and sugar beets are abnormally low and are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, thus accomplishing the purposes of the act, as set forth in the national transportation policy declared by the Congress, that the burden thus cast upon the interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be if augmented by the increases authorized generally on the same commodities in Ex Parte No. 175, and that these

intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Minnesota intrastate rates on the commodities in issue herein the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Minnesota and adjoining States under our authorization in Ex Parte No. 175, provided, however, that increases may not be made which result in levels of rates and charges higher than the general levels of interstate rates and charges maintained on like traffic for movements to and from points in Minnesota.

"5. The establishment of increased intrastate rates and charges as provided in finding 4 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, will increase the respondents' revenue substantially, and will provide not more than a just proportion of the respondents' total railway operating income.

"6. The increased revenues to the respondents which will result from increased rates and charges as provided in finding 4 are required from intrastate traffic in Minnesota in order to enable the respondents to furnish adequate and efficient railway transportation service.

"The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Minnesota, or of any interested party, to apply for modification thereof as to any individual rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

"An order carrying into effect the foregoing findings and conclusions will be entered, unless this Commission is notified by the Minnesota Commission within 30 days from the service of this report that the State Commission will permit the increases required to remove the unlawfulness herein found to exist."

By a report and order of May 20, 1957, the Minnesota ommission authorized the increases in the intrastate rates question, although still of the opinion that they were not stified, expressing its "reluctance to pursue the matter fur- ier in the courts."

The determination of the Commission, although not a rmal order, had the same effect, and is subject to review. *rozen Food Express v. United States,* 351 U.S. 40, 43-44.

Stated broadly, the contentions of the plaintiffs are that 1) the proceeding before the Commission should have been smissed as premature; (2) the findings of the Commission re inadequate; and (3) the evidentiary basis for the find- gs is inadequate.

The power of the Interstate Commerce Commission to tablish intrastate rates, in order to remove unjust dis- imination against interstate commerce, is not open to ques- on, and the Commission is not required to wait until a tate Commission has sat in judgment on the issue of the legedly discriminatory intrastate rates. *Florida v. United tates,* 282 U.S. 194, 210. Since there is a disparity between e intrastate and interstate rates in suit, the Commission ould at any time remove the disparity if it constituted, and ould justifiably be found to be, an unlawful discrimination gainst interstate commerce. The contention that the pro- eding resulting in the determination complained of by the laintiffs was premature is without substantial merit.

The controlling questions in this case seem to be: (1) Whether the findings of the Commission are adequate to sus- in its determination; and (2) whether the evidentiary asis for the finding that the intrastate rates were dis- iminatory as against interstate commerce was sufficient.

The findings of the Commission are similar to those which ere sustained by the Supreme Court as sufficient in *King v. nited States,* 344 U.S. 254, 267-276, a case analogous to the stant case. The plaintiffs are of the opinion that the deci- ons in *North Carolina v. United States,* 325 U.S. 507, and *labama v. United States,* 325 U.S. 535, require a ruling at the findings of the Commission are inadequate. It is to noted that in each of those cases four Justices of the Su- reme Court were of the opinion that the findings of the ommission were sufficient. In the King case, all but three

of the Justices were of the opinion that the defects which were thought to exist in the findings in the North Carolina and Alabama cases were not present. In the King case the court held that specific findings as to what amount in dollars would be required to enable the railroads to operate efficiently were not indispensable. (Page 274 of 344 U.S.) It was also held in that case that the Commission was not obliged to consider the reasonableness of each intrastate rate before requiring an increase. (Page 275 of 344 U.S.)

It would seem that a decision that the findings in the instant case were inadequate either with respect to the plaintiffs or the intervening plaintiff would not be justified.

In considering whether substantial evidence was before the Commission to justify the establishment of the interstate rates under Ex Parte No. 175 to the intrastate traffic on the commodities in question, it is not necessary for this Court to reinvestigate the reasonableness of the interstate rates as promulgated by the Commission in the Ex Parte No. 175 proceeding. And there is no showing here which tends to negative the premise that the revenue needs of the railroads in Minnesota are as great as the revenue needs of the railroads in their interstate transportation. Due weight also must be given to the evidence in the record which clearly establishes that the economy in Minnesota differs in no substantial respect from that which prevails generally throughout the Nation.

Plaintiffs emphasize the provisions of the 1946 Administrative Act and point out that the substantiality of the evidence in support of the Commission's findings must be considered with reference to any evidence which may detract from its weight. But we cannot find on this record that the evidence introduced before the Commission in support of intrastate rates on bituminous coal, wood bolts, and short logs so adversely affected the evidence proffered by the railroads in support of the rate increases that there was a lack of substantial evidence in support of the Commission's findings. Certainly, ample evidence was before the Commission to sustain a finding that transportation conditions incident to rail intrastate transportation in Minnesota were not more favorable than rail interstate transportation of bituminous coal on interstate routes to and from points in this State.

The number of trainmen required on local trains, the wages paid, the many train stops which necessarily are required in local transportation, together with other factors reflected in the record, amply established that the unit cost of rail transportation on intrastate traffic was at least equal to, and in many instances greater than, the railroads' interstate cost of comparable transportation. The Commission did not, as plaintiffs assert, merely consider the disparity between the intrastate and interstate rates on bituminous coal and conclude therefrom that the intrastate rates constituted an undue burden on interstate commerce.

That the railroads' operating expenses, including the price of materials, have increased substantially in recent years is evident from the record herein and is almost a matter of common knowledge. Their estimated revenue loss by being deprived of the increases in rates on intrastate shipments of the commodities in question is amply sustained. In fact, the computations of the witnesses for the railroads in this regard are attacked primarily because it is contended that, in the event of rate increases, consideration was not given to the increased competition which would result from truck traffic, to the greater use of water routes in the transportation of coal, and to the impact of the higher intrastate freight rates on the increasing tendency of consumers of coal to turn to the use of other forms of fuel, such as gas, fuel oil and lignite coal. The danger of diminishing freight revenue returns by the imposition of increased freight rates is always a relevant and formidable factor for the Commission to consider when such increases are promulgated. The nationwide impact of the increased rates under Ex Parte No. 175 no doubt is well known to the Commission. And that body is in a far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers in this regard. We cannot say, or even assume to predict, which prophetic opinions as to the impact of higher freight rates are the most sound and reliable. We assume, however, that the railroads will avail themselves of any rights they may have to meet any such increased competition by decreasing their rates below the increases permitted under Ex Parte No. 175 when competitive circumstances suggest such adjustments.

A striking example of the adverse effect of the intrastate rates on coal in interstate commerce is to be found in the situation which exists at the Head of the Lakes, where these plaintiffs have their coal docks. Duluth, Minnesota, and Superior, Wisconsin, are twin ports at the head of Lake Superior. The coal now shipped from Superior to Minnesota destinations is subject to the interstate rates. Coal shipped intrastate from Duluth is transported under the intrastate rates, although adjustment in freight rates on coal shipped from Superior to competitive rail points in Minnesota has been made by the railroads. Substantial disparities nevertheless continue to exist, and will exist, until the present intrastate rates at Duluth are raised to the level of the rates set by Ex Parte No. 175.

There was no need for the Commission to segregate interstate and intrastate revenues in this proceeding. *Illinois Commerce Commission v. United States*, 292 U.S. 474, 483. The conditions under which coal moves intrastate and interstate are substantially the same. From an operating standpoint, there is no substantial difference between the two classes of traffic, except that there is a higher cost in the handling of local trains as compared to the cost of handling interstate trains. And as the Commission pointed out, the fact that ton mile earnings on coal from Duluth to certain selected destinations in Minnesota were in excess of the ton mile earnings of the carriers on all types of rail traffic in the Nation, is not a persuasive factor in determining the need for increased revenues on coal shipped intrastate in Minnesota, particularly in absence of a showing as to the average length of the hauls considered in arriving at the average.

Consideration of the sufficiency of the evidence in support of the findings of the Commission that the intrastate rates on wood bolts and short logs cause unjust discrimination against interstate commerce requires some additional comment. It appears that the terms "wood bolts" and "short logs" are used interchangeably. They differ from pulpwood primarily in their respective dimensions. Pulpwood may include logs of a smaller diameter and different lengths. The only shipper of wood bolts and short logs in Minnesota is the intervening plaintiff, the Diamond Match Company. There are no shipments of wood bolts and short logs from

Minnesota to other states, or from other states to Minnesota, except those which have been made for experimental purposes. The record does indicate, however, that some 236 cars were shipped from Cambridge, Minnesota, to Cloquet, Minnesota, over the Great Northern, and in that transportation the Great Northern traversed for a short distance the northwest corner of the State of Wisconsin. When a certain tree is harvested, there is no particular test to be applied as to whether it will be utilized for pulpwood or wood bolts. The market conditions may determine its use, although to be utilized for wood bolts the log must be freer from knots than if it is to be used for pulpwood.

Under the so-called Cashman Act of this State, certain Minnesota freight rates were promulgated which became effective January 1, 1914. Under that Act, the published rates on wood bolts and pulpwood were the same. In Ex Parte No. 168, the Interstate Commerce Commission authorized increases in rail rates on certain commodities which became effective September 1, 1949. Thereafter, the railroads sought authority to make the same increases on the same items on intrastate traffic within the State of Minnesota. The State Commission excepted pulpwood, but not wood bolts, from the general intrastate increase sought by the railroads. This fact resulted in published rates on pulpwood and wood bolts as separate items and wood bolts were subject to the rate increases provided in Ex Parte No. 168. Later, in a Section 13 proceeding in Interstate Commerce Commission Docket No. 30761, *Minnesota Freight Rates and Charges*, the Minnesota Commission was requested to promulgate the same increases in rates for both pulpwood and wood bolts. This was done. Later, when Ex Parte No. 175 increases became effective on interstate shipments and when the railroads requested authority of the Minnesota Commission to increase their intrastate rates accordingly, the Diamond Match Company made no appearance by reason of lack of notice. Thus, when the Minnesota Commission excepted from the Ex Parte No. 175 rates jack pine, aspen timber and pulpwood, the item of wood bolts was not included in the exceptions. On March 27, 1954, the Diamond Match Company filed a petition with the State Commission praying for an order excepting wood bolts and short logs, and after a hearing the Commission found, among other things,

> "There is active competition between persons and localities in the procurement of the commodities herein involved and the Minnesota intrastate rates on these commodities cause undue and unreasonable advantage and preference of the shippers of pulpwood, and undue and unreasonable prejudice and disadvantage to the shippers of wood bolts and short logs."

In the order, wood bolts and short logs were accorded the same intrastate freight rates which had been allowed to the theretofore excepted pulpwood. Now that the Minnesota Commission has issued its order of May 20, 1957, and the interstate rate of Ex Parte No. 175 has become applicable to pulpwood, no petition has been filed attacking the increases authorized with respect to that commodity.

In the proceeding before the Minnesota Commission when the question of the exception of wood bolts and short logs from the rates established by Ex Parte No. 175 was being considered, the intervening plaintiff here strongly emphasized the direct intrastate competition which existed between the shippers and receivers of pulpwood and the shippers and receivers of wood bolts and short logs. That such competition exists is admitted in this proceeding, but the intervening plaintiff stresses the fact that there is no showing in the record that any competitive relationship exists between intrastate shippers and receivers of wood bolts and short logs and interstate shippers and receivers of pulpwood. And it is pointed out that the record does not even disclose the interstate freight rates and charges for wood bolts and short logs. But the Commission as to wood bolts and short logs did not make any finding on the record here that there was any undue preference and prejudice between persons and localities in intrastate and interstate commerce. It concluded, however, that the transportation characteristics of pulpwood, wood bolts, and short logs were the same. This is evident because the rate history of both commodities before the State Commission and the Interstate Commerce Commission has disclosed definitely that such commodities should be subject to the same freight rates. Pulpwood, short logs, and wood bolts being forest products having similar transportation characteristics suggests that they should bear the same proportion of the total revenues needed for the rail-

roads. Apparently no one now attacks the reasonableness of the interstate rate on pulpwood, at least not in this proceeding. If wood bolts and pulpwood always have been considered to have the same transportation characteristics so as to justify the same intrastate rate, it would seem that we are not in a position to overrule the expert opinion of the Commission on this record that there is unjust discrimination in permitting wood bolts to remain on an intrastate rate and that these forest products should contribute the same fair share to the total transportation revenue requirements of the railroads. The mere fact that wood bolts and short logs do not move in interstate commerce to any substantial extent does not deprive the Interstate Commerce Commission of jurisdiction if the lower intrastate rate is not bearing its just proportion of the total transportation burden. Its determination that pulpwood, wood bolts, and short logs should all be subject to the interstate rate is, on this record, a matter peculiarly within its province to determine, and not for the Courts.

Our consideration of the record in support of the findings made by the Commission as to the need for increased revenue on bituminous coal, wood bolts, and short logs convinces us that substantial evidence supports its findings. Any alleged prejudice resulting from any error of the Examiner in determining the sufficiency of the foundation for certain evidence received and the other procedural matters of which complaint is made do not require any discussion. The errors, if any, are not of sufficient gravity to justify the setting aside of the order of the Commission. The Court being convinced, therefore, that the Commission acted upon sufficient findings which are supported by substantial evidence, the language of the Supreme Court in *King v. United States,* 344 U.S. 254, 272, is strikingly appropriate here:

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms

the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

It follows, therefore, that the plaintiffs and intervening plaintiff have not sustained their right to a decree suspending, enjoining, setting aside and restraining the enforcement, application and operation of the order of the Interstate Commerce Commission in Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges*, pursuant to which the order of the Minnesota Commission of May 20, 1957, in its Docket No. A-7138-3 was issued; that therefore the complaint and intervening complaint should be, and hereby is, dismissed; and that the temporary injunction heretofore issued should be, and hereby is, vacated, annulled, and set aside. It is so ordered.

A stay of thirty days is granted, and an exception is allowed.

Dated this 26th day of December, 1957.

BY THE COURT:

John B. Sanborn
United States Circuit Judge

Gunnar H. Nordbye
United States District Judge

Robert C. Bell
United States District Judge

(Endorsed)
Filed Dec. 26, 1957.
Frank A. Massey, Clerk,
By William H. Eckley, Deputy.

# APPENDIX B

## MINUTES OF PROCEEDINGS

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 5815 Civil

DATE December 26, 1957
JUDGES John B. Sanborn
Gunnar H. Nordbye
Robert C. Bell
REPORTER Sutfin

North Western-Hanna Fuel Co.,
Berwind Fuel Company
Carnegie Dock and Fuel Company,
Inland Coal & Dock Company,
Division of the North American
Coal & Dock Company,

Plaintiffs,

and

Diamond Match Company,

Intervening Plaintiff,

vs.

United States of America,
Interstate Commerce Commission,

and

Railroad and Warehouse Commission
of the State of Minnesota,

Defendants,

and

Canadian National Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Chicago, Rock Island and Pacific Railroad Company,
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Duluth & Northeastern Railroad Company,
Duluth, Missabe and Iron Range Railway Company,
Duluth, Winnipeg and Pacific Railway Company,
Great Northern Railway Company,
Illinois Central Railroad Company,
Minneapolis & St. Louis Railway Company,
Minneapolis, Anoka and Cuyuna Range Railroad Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company,
Minnesota, Dakota & Western Railway Company,
Minnesota Western Railway Company,
Northern Pacific Railway Company,

Intervening Defendants.

APPEARANCES:

Larson, Loevinger, Lindquist, Freeman & Fraser
By Leonard E. Lindquist
John F. Donelan
(Attorneys for Plaintiffs)

Louise A. Herou
(Attorney for Intervening Plaintiff)

Victor R. Hansen, Assistant Attorney General
James E. Kilday and Robert S. Burk,
Attorneys, Department of Justice
George E. MacKinnon, United States Attorney
Robert W. Ginnane, General Counsel
Samuel R. Howell, Ass. Gen. Counsel
(Attorneys for Defendants)

G. F. Bennet
L. C. Corcoran
Ross L. Thorfinnson
Charles H. Clay
F. B. Stevens
Warren H. Ploeger
Frank S. Farrell
L. E. Torimus, and
Curtis H. Berg
(Attorneys for Intervening Defendants.)

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Pursuant to decision filed this day, it is

CONSIDERED, ORDERED AND ADJUDGED that the complaint and intervening complaint herein be, and the same is hereby dismissed, and the temporary injunction heretofore issued be, and the same hereby is vacated, annulled, and set aside, and it is

FURTHER ORDERED That a stay of thirty days be granted, and an exception is allowed.

William H. Eckley
William H. Eckley
Deputy Clerk.

ATTEST: A True Copy in two pages.

Certified this 26th day of December, 1957.

Frank A. Massey, Clerk,

By William H. Eckley, Deputy Clerk.

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# APPENDIX C

BEFORE THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA

| | |
|---|---|
| Paul A. Rasmussen | Chairman |
| Hjalmar Petersen | Commissioner |
| Ewald W. Lund | Commissioner |

IN THE MATTER OF THE PETITION OF RAILROADS OF THE STATE OF MINNESOTA FOR AUTHORITY TO INCREASE FREIGHT RATES AND CHARGES, 1951.

Docket No. A-7138-3

## REPORT AND ORDER

This report and order is the result of a proceeding before the Interstate Commerce Commission in Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges,* instituted by that Commission in response to a petition dated May 3, 1955, filed by 19 railroads serving Minnesota, hereinafter referred to as petitioners, averring that the Railroad and Warehouse Commission of the State of Minnesota, hereinafter called the Minnesota Commission, had failed or refused to authorize or permit petitioners to establish for intrastate transportation upon their railroads in Minnesota, the same increases in freight rates and charges corresponding to those authorized by the Interstate Commerce Commission under proceedings in Ex Parte No. 175, *Increased Freight Rates, 1951,* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, 289 I.C.C. 395, 292 I.C.C. 23, and 297 I.C.C. 17.

Petitioner alleged that the refusal of the Minnesota Commission to permit the increases on intrastate traffic referred to in the preceding paragraph caused and resulted in undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate com-

merce on the one hand, and interstate commerce on the other hand; and undue, unreasonable and unjust discrimination against interstate commerce, in violation of Sections 3, 13 (4) and 15a (2) of the Interstate Commerce Act.

The excepted commodities upon which the Minnesota Commission refused to allow the same increases as were permitted by the Interstate Commerce Commission in Ex Parte 175, presently are anthracite, bituminous coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs, and jack-pine and aspen timber), and sugar beets.

The report of the Interstate Commerce Commission herein served on May 8, 1957, carries a provision that, "An order carrying into effect the foregoing findings and conclusions will be entered, unless this Commission is notified by the Minnesota Commission within 30 days from the service of this report that the State Commission will permit the increases required to remove the unlawfulness herein found to exist."

While the Minnesota Commission, after hearings, found that the increases sought were not justified, and concluded that there would be no violation of the Interstate Commerce Act, it is reluctant to pursue the matter further in the Courts and has advised the Interstate Commerce Commission that it will permit the increases to become effective,

WHEREFORE, IT IS ORDERED, That all railroads operating in the State of Minnesota be and they are hereby authorized to establish on statutory notice, to become effective July 1, 1957, and in the manner authorized by the Interstate Commerce Commission in its report and findings decided April 23, 1957, increases in freight rates therein found justified.

Dated at Saint Paul, Minnesota, this 20th day of May, 1957.

BY THE COMMISSION

Oliver A. Ossana
Secretary

(SEAL)

## APPENDIX D

The pertinent provisions of the Interstate Commerce Act (49 U.S.C.) involved in this case are as follows:

Section 13 (3):

> Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

Section 13 (4):

> Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or

minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a (2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The National Transportation Policy (49 U.S.C. preceding Section 1) is as follows:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United

States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

The pertinent provisions of the Administrative Procedure Act (5 U.S.C.) involved in this case are as follows:

Section 7 (c):

Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 10 (c):

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Section 10(e):

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitation, or short of statutory rights; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

# APPENDIX E

BEFORE THE RAILROAD AND WAREHOUSE COMMISSION
OF THE STATE OF MINNESOTA

| | |
|---|---|
| Paul A. Rasmussen | Chairman |
| Hjalmar Petersen | Commissioner |
| Ewald W. Lund | Commissioner |

IN THE MATTER OF THE PETITION OF RAILROADS OF THE STATE OF MINNESOTA FOR AUTHORITY TO INCREASE FREIGHT RATES AND CHARGES, 1951.

A-7138-3

## FINAL REPORT, FINDINGS OF FACT AND ORDER

By preliminary Report and Order herein dated December 19, 1955, the Commission, in the main, granted the petition of the railroads, but required that no increases should be made in the rates on:

| | |
|---|---|
| Aspen Timber | Limestone, Agricultural |
| Bolts, wood | Logs, short |
| Coal, Anthracite or Bituminous | Pulpwood |
| Coke | Rock, crushed |
| Jack-pine | Sugar Beets |

Although the preliminary report of the Commission was silent as to the application or non-application of the proposed increases in the then existing rates on Granite, rough quarried, which includes sawed slabs of granite, the railroads provided in their tariffs that no increases should be applied to such commodity rates. The preliminary report and order of the Commission dated November 30, 1955, with respect to Granite, rough quarried, and sawed slabs did provide that the proposed increases should be applied to the per car charges prescribed by the Commission in Docket

No. A-7329, *Northwest Granite Manufacturers Association, Inc., et al., vs. C. & N. W. Ry., et al.*, to become effective January 1, 1956. The railroads, however, without notice to this Commission and without asking for reconsideration of the Commissions' order in Docket No. A-7329, supra, obtained a temporary stay of said order from the District Court of Stearns County, and the Commission was ordered to show cause on January 7, 1956, why said order of November 30, 1955, should not be stayed pending the appeal therein.

On January 6, 1956, attorneys for the respective parties to the proceeding entered into a stipulation providing that the order of the Minnesota Railroad and Warehouse Commission dated November 30, 1955, entered in its Docket A-7329, supra, could be stayed until the entry of an order by the District Court on the appeal therein. The Commission also was advised in writing by Counsel for the railroads that rough-quarried granite or granite sawed-slabs will not be in issue in I.C.C. Docket 31798, to be heard commencing January 24, 1956.

Evidence offered in support of the proposed increases in connection with the rates on commodities heretofore or herein exempted from increases was presented by the railroads, and protestants again submitted substantial evidence in opposition thereto.

Railroads contend that since the Interstate Commerce Commission had allowed the increases in connection with interstate rates and charges, in a so-called revenue case, Ex Parte 175, the Minnesota Commission should allow the same increases and should not take into consideration the reasonableness of rates resulting therefrom or what effect such increased rates might have on certain industry and the state's economy. The railroads did ask, however, that rates on those commodities on which they have already voluntarily cancelled the previously authorized increases should not now be increased.

The Commission, however, is not privileged, under the provisions of the statute, to dispose of a petition for rate increases in the manner suggested. The Commission must determine the reasonableness of each individual commodity rate or accessorial charge. Principal testimony and evidence of the railroads was confined to a showing for Minnesota by

Exhibit No. 127, for the years 1950 through 1954, of the following:

1. Revenue per ton miles.
2. Revenue ton miles.
3. Income payments per capita.
4. Income payments to individuals by industry groups.
5. Sources of personal income.
6. Production, disposition, and value of cattle and calves.
7. Production, disposition and value of hogs.
8. Production, price per bushel received by farmers and farm value of corn, flaxseed and wheat.
9. Cash farm income from sale of selected and total agricultural production by farmers.

Testimony and evidence for the United States as a whole for the same years was confined to:

1. Prices received and paid by farmers.
2. Wholesale prices by major groups.
3. Consumer price index by major groups.
4. Units of Service, Operating Revenues and Net Railway Operating Income of Class I railroads.
5. Industrial Production compared with sales and net income after taxes.
6. Industrial Production, Manufacturing and Mining.

Certain additional system statistical information was furnished applicable to Class I railroads serving the State of Minnesota, and a comparison of rates state versus interstate.

The following comparisons in carload commodity rates state versus interstate were shown:

(Rates in cents per 100 pounds, except as otherwise shown.)
(Including X-175 Increases.)

| *Commodity* | *From* | *To* | *Miles* | *State* | *Interstate* |
|---|---|---|---|---|---|
| Soap, etc. | Twin Cities | Duluth, Minn. | 151.2 | 37 | |
| Soap, etc. | Twin Cities | Superior, Wis. | 143.5 | | 37 |
| Cement | Duluth, Minn. | St. Paul, Minn. | 151.2 | 25 | |
| Cement | Superior, Wis. | St. Paul, Minn. | 143.5 | | 25 |
| Pig Iron | Duluth, Minn. | Minneapolis, Minn. | 153.4 | 401 G.T. | |
| Pig Iron | Duluth, Minn. | Eau Claire, Wis. | 157.6 | | 401 G. T. |
| Scrap Iron | Dodge Center, Minn. | Minn. Trf., Minn. | 71.7 | 14 | |
| Scrap Iron | Ashland, Wis. | Duluth, Minn. | 75.8 | | 15 |
| Scrap Iron | Blue Earth, Minn. | Minneapolis, Minn. | 123.3 | 17 | |
| Scrap Iron | Ironwood, Mich. | Duluth, Minn. | 115.9 | | 18 |
| Iron & Steel | Duluth, Minn. | Fairmont, Minn. | 282. | 55 | |
| Iron & Steel | Duluth, Minn. | Mason City, Iowa | 283. | | 63 |
| Iron & Steel | Duluth, Minn. | Winona, Minn. | 254. | 51 | |
| Iron & Steel | Duluth, Minn. | La Crosse, Wis. | 265. | | 60 |
| Fresh Meat | Winona, Minn. | St. Paul, Minn. | 103.1 | 36 | |
| Fresh Meat | Mason City, Iowa | St. Paul, Minn. | 136.5 | | 37 |
| Fresh Meat | Austin, Minn. | Duluth, Minn. | 249.1 | 49 | |
| Fresh Meat | Mason City, Iowa | Duluth, Minn. | 283. | | 66 |
| Lime | Duluth, Minn. | St. Paul, Minn. | 151.2 | 18 | |
| Lime | Superior, Wis. | St. Paul, Minn. | 143.5 | | 18 |

G.T. Denotes: Gross Ton

In addition to the foregoing, carload commodity rate comparisons were made on brick, common; crushed limestone, grain, sugar beets; stone and granite, rough quarried; iron ore, coal, coke, pulpwood, short logs and livestock; and in so far as herein applicable and necessary, will be covered in greater detail in the report hereof.

The carriers failed to show operating results in Minnesota as distinguished from system operations except by a few general estimates having no competent probative value as to the main issues in this proceeding. No showing was made that the failure of this Commission to allow the full measure or no increases on certain commodities in the past has unduly prejudiced or discriminated against interstate shippers or unduly preferred intrastate shippers. No showing was made that the Minnesota shippers were not contributing their just share to the maintenance of a National Transportation System.

Comparisons of carload commodity rates shown on page 3, state versus interstate, on Soap, Soap Powders, Cleaning Compounds, Cement, Pig Iron, Lime and other commodities reflect no disparity and, of course, are here not material.

Rates on Scrap Iron, Dodge Center, Minnesota, to Minnesota Transfer, Minnesota, intrastate, versus Ashland, Wisconsin to Duluth, Minnesota, interstate, reflect a difference in rates of 1 cent per 100 pounds due principally to the failure of the Carriers in justifying the establishment of the I.C.C. Docket 28300 basis of class rates in Minnesota. The same is true of the difference of one cent per 100 pounds in the rates on scrap iron, Blue Earth, Minnesota to Minneapolis, Minnesota, intrastate versus Ironwood, Michigan, interstate, to Duluth, Minnesota.

The same explanation also applies to the difference in rates shown on Iron and Steel Articles, Fresh Meat, Lime and class rates, all of which are here not material.

## Rates on Exempted Commodities

### *Forest Products*

Under the generic term, Forest Products, is included, Aspen Timber; Bolts, wood; Jack-pine; Logs, short, and Pulpwood. Pulpwood is used in the manufacture of pulp and paper and usually consists of spruce, balsam, jack-pine, tamarack, poplar (aspen) and birch.

Aspen Timber (poplar), Bolts, and short logs are used in the manufacture of insulating materials, clothes pins, match splints and matches.

Forest products move in or on inexpensive equipment, not suitable for other purposes, usually in multiple car lots; there is no delay in loading or unloading and claims for loss and damage are rare.

Forest products are a raw product entitled to rates below the average.

Protestant, Diamond Match Company, operates a plant located at Cloquet, Minnesota, where it employs approximately 500 persons, and is engaged in the manufacture, sale and distribution of clothes pins, match splints and matches. Protestant's merchandise is manufactured from forest products consisting of wood bolts and short logs of the species aspen (also called poplar), birch and basswood; which forest products are harvested mainly in the northern half of the State of Minnesota. Protestant purchases some of these raw materials and also harvests some from its own land and on land in which it owns stumpage rights. The total amount of protestant's timber receipts at its Cloquet plant for the years 1950 to August 31, 1955, inclusive, was 128,186 cords, of which 108,109 were delivered to its plant by applicant railroads.

A standard cord is four feet by eight feet by four feet (4′x8′x4′) and contains 128 cubic feet.

The forest products used by Protestant are wood bolts generally 50 inches in length and short logs 100 inches in length, and eight inches and over inside the bark on the small end of the log, and free of knots, splits and center rot.

In freight tariffs these forest products are classified as short logs, where that specific commodity is mentioned in

the tariff, or as wood bolts, in the absence of a definition for short logs. The definition of short logs as stated by this Commission in Docket A-3024 and as subsequently amended is as follows:

> "Short Logs (Not pulp wood): Timbers, rough as from the tree, suitable for box or lath making purposes, 3 feet 8 inches in length, 8 feet 4 inches in length, or over 8 feet 4 inches in length but not over 10 feet in length, including Trimmings or Slashings, (not pulpwood or wood bolts), rough as from the trees, usable only in the manufacture of insulating material."

There is no tariff definition of wood bolts. The terms short log and wood bolt are used interchangeably. The above described forest products are distinguished from pulpwood which in the past has been defined by the Commission as: "Wood, rough as from the tree, of spruce, balsam, and other woods suitable for paper making, four inches and over in diameter and not more than eight feet in length." There is no rigid test whereby a particular part of a log must be absolutely classified as pulpwod or as wood bolts. Thus, the same part of a log might be classified as a wood bolt in one instance and as pulpwood in another. It is only after a log has been cut for a specific purpose that the parts of a log are referred to by the terms described above; however, in the past wood bolts and short logs have been shipped in transportation classified as pulpwood and used for the manufacture of pulp or paper.

Diamond Match Company is not engaged in the business of paper making but manufactures only clothes pins, match splints and matches, and all timber shipped to its plant is classified either as short logs or wood bolts.

## Wood Bolts

Subsequent to the passage of the Cashman Act, Section 218, M.S.A., by the Legislature of our State, the Commission prescribed mileage rates for the transportation by railroads of wood bolts and pulpwood, which rates became effective on January 1, 1914. Defendants published rates on wood bolts and pulpwood in the same item and the rates were on the same basis. Although these rates were from time to time decreased and increased, there was no difference between the rates charged for wood bolts and pulpwood for many years.

After the Interstate Commerce Commission in Ex Parte 168 authorized increases in rail rates on interstate traffic, which increases became effective September 1, 1949, the railroads sought authority to make increases in their intrastate freight rates and charges applicable on all commodities within Minnesota to the same extent as increases had been authorized by the Interstate Commerce Commission on corresponding interstate traffic, to, from, and through Minnesota. In Docket No. A-6970, a companion case to the interstate adjustment, this Commission excepted pulpwood, but not wood bolts, from the general increase sought by the railroads; and pulpwood and wood bolts were then published as separate items, with the result that wood bolts and short logs thereafter were subjected to increases authorized for application on commodities generally.

Following the 13 Section Case, I.C.C. Docket 30761, *Minnesota Freight Rates and Charges*, this Commission was required to authorize the same increases in rates for pulpwood and wood bolts and as a result the rates again became equal.

Thereafter, the Interstate Commerce Commission in Ex Parte 175, again authorized increases in rail rates, and in a companion case Docket A-7138, the Minnesota Commission again excepted Pulpwood, Jack-pine and Aspen Timber. Respondent, Diamond Match Company, complained to the Minnesota Commission, alleging among other things that the failure to exempt increases on Wood bolts and Short logs created discrimination whereupon the Commission after hearing required the removal of the authorized increases on those commodities.

### Short Logs

As in the case of wood bolts, the Commission prescribed mileage rates for short logs in 1914 after the passage of the Cashman Act. Over the years, there also have been general increases and decreases in these rates. The Commission, as in the case of wood bolts, did not in its orders entered in Docket A-7138 and A-7138-2, except short logs along with pulpwood and jack-pine and aspen timber from the general increase allowed in freight rates and charges, but required the elimination of such increases in Docket A-7299: *Diamond Match Co. vs. C. N. Ry. et al.*, effective November 15, 1954.

## Values of Forest Products

In Docket A-7299, supra, the value of aspen timber, jack-pine, wood bolts and pulpwood was shown to be:

| | |
|---|---|
| Aspen Bolts | $16.00 per single cord |
| Birch Bolts | $21.00 per single cord |
| Aspen Pulpwood | $12.00 per single cord |
| Balsam Pulpwood | $18.50-$20.50 per single cord |
| Spruce Pulpwood | $22.50-$24.50 per single cord |
| Jack-pine Pulpwood | $17.00 per single cord |

## Pulpwood

According to reports of the Western Weighing and Inspection Bureau the weight of pulpwood is 4,200 pounds per cord and the weight of wood bolts is 5,000 pounds per cord for aspen bolts and 5,500 pounds per cord for birch bolts.

Comparisons of rates, Minnesota intrastate, Interstate, Wisconsin intrastate and Michigan intrastate were supplied for the record by both petitioners and protestants.

While it was shown that the interstate rates are somewhat higher than the Minnesota intrastate rates on pulpwood; it was pointed out that only pulpwood of certain species of wood moves in interstate commerce. No movement of Wood bolts or Short logs was shown.

Intrastate rates in Wisconsin and Upper Michigan were shown to be materially lower than the Minnesota rates, either present or proposed.

### *Examples*

Present and Proposed Rates on Pulpwood

(Rates in cents per 100 pounds)

| | Minnesota | | Wisconsin | | Michigan |
|---|---|---|---|---|---|
| Miles | Present | Proposed | Single Line | Two Lines | Single Line |
| 25 | 6 | 7 | 4.5 | 5.75 | 4.5 |
| 50 | 7 | 8 | 6 | 7 | 6 |
| 75 | 8.5 | 10 | 7 | 8.5 | 7 |
| 100 | 9 | 10.5 | 8 | 9.5 | 8 |
| 150 | 11 | 13 | 9.5 | 11 | 9.5 |

When consideration is given to rates for all mileage blocks 5 to 150 inclusive, the above scales show that the present Minnesota scale is 15.11 percent higher than the Wisconsin and Michigan single line scales; and if the proposal of the carriers was granted the Minnesota scale would be 31.92 percent higher than the Wisconsin and Michigan single line scales.

COAL, ANTHRACITE AND BITUMINOUS

The record is replete with testimony and evidence that the addition of the proposed increase to the present rates would result in rates which are excessive, unreasonable and discriminatory, and will invite and cause a substantial conversion to other types of fuel; namely, gas, fuel oil and lignite, two of which have received preferential rate treatment.

The record also shows that with three general rate increases authorized since 1949, the traffic via barge from the Midwestern coal fields has increased as follows:

| Year | Total Tons (1) |
|---|---|
| 1949 | 959,427 |
| 1950 | 1,126,044 |
| 1951 | 1,048,728 |
| 1952 | 1,008,383 |
| 1953 | 1,261,859 |
| 1954 | 1,433,963 |
| 1955 | 1,574,283 |

(1) Source: U. S. Army Engineer Reports—St. Paul District.

and furthermore that some of that traffic is now moving inland from the Twin Cities by Motor Carrier.

The record shows that 1,812,589 tons of Lake Superior Dock Coal have been displaced by Midwest (Barge) coal, gas, fuel oil and lignite at 489 Industries, Commercial Establishments and Institutions in Minnesota in recent years.

A serious threat to the movement of all coal from the Lake Superior Docks is developing because of the extensive inbound movement of grain by Motor Carrier and the possibility of a return movement of coal to rural or country

destinations by the same carriers at the present or lower rates. (Exhibit 36, p. 8.)

## Coke

As a fuel, coke falls into the same category as coal, and statements made with respect to coal apply equally to coke.

## Limestone—Agricultural

Agricultural Limestone is a soil conditioner corrective or assistant and is required on much of Minnesota farm lands to render the soil productive. Testimony was to the effect that the University of Minnesota, Soil Department, has stressed that agricultural limestone should be applied to lands in certain counties at the rate of approximately two to three tons per acre every five years to ten years; that approximately 8,000,000 tons should be applied annually during the next several years and at a rate of 3,500,000 tons per year thereafter.

In the past the greatest amount which has been applied in Minnesota in any one year has been 482,122 tons or only 14 percent of the needed requirement. In our neighboring state of Wisconsin, an average of 1,468,742 tons have been applied annually. High freight rates were blamed as the chief cause for the Minnesota deficiency.

The following comparative freight rates were introduced:

*Agricultural Limestone*

(Exclusive of Ex Parte 175 Increases)

(Rates in cents per net ton)

| | | — Illinois — | | | | Increase |
|---|---|---|---|---|---|---|
| Miles | Minnesota | Interstate | Intrastate | Iowa | Wisconsin | Minn. over Wis. |
| 50 | 117 | 116 | 89 | 107 | 106 | 11 |
| 100 | 162 | 132 | 101 | 141 | 133 | 29 |
| 150 | 188 | 158 | 125 | 174 | 138 | 50 |
| 200 | 232 | 177 | 144 | 196 | 144 | 88 |
| 250 | 243 | 183 | 150 | 213 | 150 | 93 |
| 300 | 308 | 189 | 156 | 229 | 156 | 152 |
| 350 | 329 | 195 | 162 | 245 | 162 | 167 |
| 400 | 349 | 231 | 198 | 262 | 168 | 181 |

## Crushed Rock

Crushed Rock is used principally for road surfacing and it was stated that the cost of producing this material is much higher than gravel from wayside pits. It was also stated that in many instances freight charges range in amounts equal to or twice the value of the commodity; that in the year 1953, 4,000,000 tons of crushed rock were lost to the railroads due to rate increases and that during the same year Motor Carriers and Barge Lines increased their tonnage by 5,000,000 tons.

Evidence was offered by shippers showing an extreme disparity in rates—Minnesota versus neighboring states as follows:

*Crushed Rock*

(Rates in cents per net ton)

(Exclusive of Ex Parte 175 increases)

| | | | | South Dakota | | | Increase |
|---|---|---|---|---|---|---|---|
| Miles | Minnesota | Iowa | Nebraska | Single Line | Joint Line | Wis. | Minn. over Wis. |
| 50 | 117 | 124 | 84 | 102 | 117 | 105 | 12 |
| 100 | 162 | 167 | 136 | 143 | 158 | 138 | 24 |
| 110 | 175 | 172 | 143 | 151 | 166 | 138 | 37 |
| 150 | 188 | 191 | 168 | 180 | 195 | 149 | 39 |
| 180 | 211 | 206 | 181 | 200 | 210 | 149 | 62 |
| 200 | 232 | 216 | 188 | 209 | 219 | 171 | 61 |
| 230 | 243 | 225 | 232 | 227 | 237 | 171 | 72 |
| 260 | 286 | 235 | 243 | 235 | 245 | 182 | 104 |
| 290 | 308 | 244 | 254 | 250 | 260 | 182 | 126 |
| 350 | 329 | 256 | 275 | 274 | 284 | 182 | 147 |

## Sugar Beets

Sugar Beets move predominantly intrastate to factories in states in which sugar beets are produced, and the record shows that if the proposed increase in rates in Minnesota was authorized Minnesota would have substantially higher rates than the state of Colorado which is located in the so-called higher rate territory:

*Sugar Beets*

(Rates in cents per 100 pounds)

| Miles | Minnesota Present | Minnesota Proposed | Southern Colorado | Northern Colorado |
|---|---|---|---|---|
| 10 | 35 | 52 | 30 | 25 |
| 15 | 35 | 52 | 35 | 35 |
| 20 | 35 | 52 | 40 | 40 |
| 25 | 50 | 76 | 50 | 45 |
| 30 | 50 | 76 | 50 | Maximum |
| 35 | 50 | 76 | 50 | distance |
| 40 | 50 | 76 | 50 | used. |
| 45 | 56 | 83 | 60 | |
| 50 | 56 | 83 | 60 | |
| 55 | 60 | 90 | 60 | |
| 60 | 60 | 90 | 60 | |
| 65 | 70 | 105 | 70 | |
| 70 | 70 | 105 | 70 | |
| 75 | 70 | 105 | 70 | |
| 80 | 70 | 105 | 70 | |
| 85 | 70 | 105 | 70 | |
| 90 | 70 | 105 | 70 | |
| 95 | 70 | 105 | 70 | |
| 100 | 70 | 105 | 70 | |

## Livestock

The Commission in its preliminary report and order allowed the proposed increases in the rates on livestock to which there was no objection. An authorized representative of the South St. Paul livestock industry, however, served notice that if any exceptions are proposed by the Minnesota railroads with respect to the intrastate rate structure for livestock—cattle, calves, hogs and sheep—that they will insist that such exceptions in rates be made applicable to all competing markets.

## General Discussion and Conclusions

As in the past, in similar proceedings, the carriers are here asking that this Commission grant to them exactly the same increases in freight rates and charges as were

authorized by the Interstate Commerce Commission without determining the reasonableness of such increased rates and charges or what effect they may have on industry and the economy of the state.

The shippers of Forest Products, Coal, Coke, Limestone, Crushed Rock and Sugar Beets offered substantial and convincing testimony and evidence that if the proposed increases were authorized on these commodities there would be a substantial diversion of traffic and that the rates resulting therefrom would exceed materially the rates maintained by the same carriers in adjoining and neighboring states.

No testimony or evidence was offered to show the operating results from Minnesota operations or that Minnesota industry was not contributing its just share to the maintenance of a National Transportation system.

The Commission is still of the opinion it had in 1953, which was repeated by the Interstate Commerce Commission in I.C.C. 30761, *Minnesota Intrastate Rates and Charges:*

> "Contrary to views of respondents that the requested increases, if granted, would not divert any substantial volume of traffic to other forms of transportation, that Commission feels that such a diversion would occur and that it would be sufficient to cause a loss of revenue far exceeding the contemplated gains."

There have been no complaints to the Minnesota Commission by shippers from other states as to prejudice or discrimination due to the failure to authorize the Interstate Commerce Commission approved increases on the exempted commodities.

On the other hand, there have been complaints from other states and a query from the Interstate Commerce Commission with respect to the non-establishment of the Docket 28300 class rate adjustment in Minnesota. In its report in Docket 30761, supra, 288 I.C.C. 149-158, the Interstate Commerce Commission stated:

> "Minnesota Class rates are basically lower than the interstate class rates now maintained by the respondents in this territory * * *."

Carriers offered testimony and evidence showing comparisons in rates on many commodities here not in issue. No

showing was made that the present rates on the excepted commodities were unreasonable.

It is manifestly improper to show comparisons in carload rates based on class rates, state versus interstate, as has been done in this proceeding when such comparisons are self-serving and mitigate against the entire Minnesota contribution to the revenue requirements of the Carriers.

We conclude and find:

1. That Forest Products, i.e., Aspen Timber, Wood Bolts, Jack-pine, Short Logs and Pulpwood are raw products generally accorded transportation rates lower than the average; that the movement is in or on equipment not suitable for the transportation of general commodities; that the movement is in multiple car lots and not subject to loss and damage. That the transportation of Forest Products is highly susceptible to movement by Motor Carriers. That rates on Forest Products in the states of Wisconsin and Upper Michigan are materially lower than in the state of Minnesota. That the present rates in Minnesota increased as proposed would exceed a just and reasonable level.

2. That with respect to Coal and Coke there has already been a drastic conversion to other forms of fuels and a marked diversion to other modes of transportation. That the granting of the increases proposed would materially accelerate such diversion and conversion. That the present rates with the addition of the proposed increases would result in rates which would be excessive, unjust and unreasonable.

3. That the present rates on Agricultural Limestone are substantially higher than in adjoining states. That certain Minnesota soils are in dire need of limestone treatment. That the present rates with the proposed increases added would result in rates which would be excessive, unjust and unreasonable and would stifle the use of limestone for soil treatment.

4. That Crushed Rock is used for road surfacing purposes and is directly competitive with sand and gravel. That the cost of producing Crushed Rock exceeds the cost of obtaining sand and gravel from wayside pits. That applicant carriers voluntarily maintain materially lower rates on the same commodity in adjoining states. That the

present rates on Crushed Rock increased as proposed by the railroads would result in rates which would be excessive, unjust and unreasonable.

5. That the transportation of Sugar Beets generally is confined to intrastate movement within the states in which they are produced. That the present rates in Minnesota with the proposed increases added would result in rates higher than rates maintained by the applicant carriers in other sugar beet producing states and would result in rates which would be excessive, unjust and unreasonable.

6. That as to each of the excepted commodities herein involved and referred to in paragraphs 1 to 5 inclusive, there is no active competition between persons and localities engaged in interstate commerce, on the one hand, and persons and localities engaged in intrastate commerce in Minnesota, on the other hand.

7. That it has not been shown that the present Minnesota intrastate rates on each of the excepted commodities herein involved and referred to in paragraphs 1 to 5, inclusive, without the proposed increases added, have caused or in the future will cause undue and unreasonable advantage and preference of Minnesota intrastate shippers and localities, and undue and unreasonable prejudice and disadvantage of interstate shippers and localities.

8. That each of said excepted commodities named in paragraphs 1 to 5, inclusive, hereof, are highly susceptible to diversion to other modes of transportation and any increases in the individual rates thereon would result in diversion of a substantial volume of traffic and such diversion would be sufficient to cause a loss of revenue exceeding any possible gains which would be derived from the proposed increases on the remaining traffic involving each of said excepted commodities retained by the railroads.

WHEREFORE, IT IS ORDERED, That the provisions of this Commission's preliminary order herein dated December 19, 1955, a copy of which is attached hereto and made a part hereof, shall remain in full force and effect.

Dated at Saint Paul, Minnesota, this 20th day of January, 1956.

BY THE COMMISSION

(Seal) Oliver A. Ossanna, Secretary

# APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 5815

North Western - Hanna Fuel Co.,
Berwind Fuel Company,
Carnegie Dock and Fuel Company,
Inland Coal & Dock Company,
Division of The North American
Coal & Dock Company,

Plaintiffs,

vs.

United States of America,
Interstate Commerce Commission,
and
Railroad and Warehouse Commission
of the State of Minnesota,

Defendants.

## TEMPORARY RESTRAINING ORDER

The above entitled matter came duly before the Court on the application of the plaintiffs for a temporary restraining order and notice thereof to the defendants.

Mr. Leonard E. Lindquist and Mr. Lee Loevinger, of Minneapolis, Minnesota (Messrs. Larson, Loevinger, Lindquist, Freeman and Fraser, of Minneapolis, Minnesota, of counsel) appeared in behalf of the plaintiffs;

Mr. George E. MacKinnon, United States Attorney, of St. Paul, Minnesota, appeared in behalf of the Interstate Commerce Commission and United States of America;

Mr. Curtis H. Berg, of St. Paul, Minnesota, appeared in behalf of the Great Northern Railway Company, proposed intervener, in opposition to the granting of the motion for a temporary restraining order;

Mr. G. F. Bennett, of Minneapolis, Minnesota, Mr. F. B. Stevens, of Duluth, Minnesota, Mr. L. C. Corcoran, Mr. Ross L. Thorfinnson, Mr. Charles H. Clay, of Minneapolis, Minnesota, and Mr. Warren H. Ploeger, Mr. Frank S. Farrell, Mr. L. E. Torinus, of St. Paul, Minnesota, appeared as attorneys of record for the remaining proposed interveners Canadian National Railway Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Duluth & Northeastern Railroad Company; Duluth, Missabe and Iron Range Railway Company; Duluth, Winnipeg and Pacific Railway Company; Illinois Central Railroad Company; Minneapolis & St. Louis Railway Company; Minneapolis, Anoka and Cuyuna Range Railroad Company; Minneapolis, Northfield and Southern Railway; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; Minnesota, Dakota & Western Railway Company; Minnesota Western Railway Company; and Northern Pacific Railway Company.

No appearance was made by the Railroad & Warehouse Commission of the State of Minnesota.

The Interstate Commerce Commission and the United States of America did not resist or support the granting of the motion for a temporary restraining order, but did state in open court, through their counsel, that they had no objection to an order which would maintain the status quo until the hearing before the three-judge court which is to be convened to hear the motion for a temporary injunction.

The Court having duly considered plaintiffs' motion for a temporary restraining order and interlocutory injunction, the matters alleged therein, the affidavits attached thereto, the verified complaint herein, and all of the pleadings, files and records herein, and being duly advised in the premises, hereby finds:

1. The Interstate Commerce Commission in a decision dated April 23, 1957, and served May 8, 1957, in I.C.C. Docket No. 31798, ordered the Minnesota Railroad and

Warehouse Commission to authorize increased railroad freight rates on intrastate traffic within the State of Minnesota on certain specified commodities, including bituminous coal, and the Minnesota Railroad and Warehouse Commission in an order dated May 20, 1957, in Docket No. A-7138-3, complied with said order and authorized an increase in said rates.

2. Tariffs have been filed pursuant to said orders the effect of which will be to increase the railroad freight rates on intrastate traffic within the State of Minnesota on certain commodities, specified therein, including bituminous coal.

3. The plaintiffs herein are shippers of bituminous coal and ship very large quantities of such coal from points within the State of Minnesota to other points within the State of Minnesota via intrastate routes.

4. Said coal is highly competitive with other forms of fuel and the cost thereof to the consumer is the determining factor, in many cases, in whether such coal or other forms of fuel will be used.

5. There is no factual showing which contravenes the record herein in support of plaintiffs' motion, and upon this uncontradicted record, this Court finds that the plaintiffs are economically unable to absorb or themselves pay the amount of the freight rate increase authorized on said coal as aforesaid; that in many cases the consumers are unable or unwilling to pay an increased price over the present price for said coal, and many consumers will convert their equipment from the utilization of bituminous coal to the utilization of other forms of energy rather than pay an increased price for said coal; that once the equipment of such consumers has been converted from the utilization of coal to the utilization of other forms of fuel, the consumers are lost to the plaintiffs as customers for coal; and that, therefore, if the cost of transportation of said coal is increased, the plaintiffs will lose many of their customers and will thereafter be unable to regain such customers, and will thus suffer irreparable damage.

6. The complaint of the plaintiffs herein raises substantial and serious questions and issues as to the propriety and legality of the aforesaid orders of the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission.

7. In order to maintain the status quo herein, to prevent irreparable damage and injury to the plaintiffs herein, and in order to permit this Court to grant effective relief if it should find upon final hearing and determination of this matter that the plaintiffs are entitled to relief herein, it is essential that the operation of the aforesaid orders of the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission be restrained and enjoined temporarily and the effectiveness of said orders be suspended temporarily until this matter may be brought before a three-judge court as provided by statute.

8. A temporary restraining order restraining and enjoining the operation of said orders of the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission and suspending the effective date of said orders will not injure or damage the Interstate Commerce Commission or the Minnesota Railroad and Warehouse or prejudice their respective interests or positions.

9. The facts herein found are based upon the matters presented to this Court by John A. Mahrer, Martin Burke, Jr., Harold Watson, Walter Winslow, C. D. Cooper, and Raymond J. Fitzgerald in their respective affidavits submitted in support of plaintiffs' Motion for Temporary Restraining Order and Interlocutory Injunction, and upon the verified Complaint and the exhibits attached thereto.

WHEREFORE, IT IS ORDERED, that the operation, application and effectiveness of the decision of the Interstate Commerce Commission of April 23, 1957, in Docket No. 31798, and the order of the Minnesota Railroad and Warehouse Commission of May 20, 1957, in Docket No. A-71383, be and they hereby are stayed, suspended, restrained and enjoined until further hearing and order of this Court herein in so far as said orders relate to bituminous coal, and that the Minnesota Raiload and Warehouse Commission take all necessary and appropriate steps to cancel the tariffs filed pursuant to said orders and to maintain the present rates for the intrastate transportation within Minnesota of bituminous coal until the further hearing and order of this Court herein.

Dated this 27th day of June, 1957.

BY THE COURT:

GUNNAR H. NORDBYE, Chief Judge.

# APPENDIX G

UNCONTROVERTED REVENUE LOSS—BITUMINOUS COAL

| Consumers | Location | Minimum Annual Volume (Net Tons) | Present Rates (¢ Per Ton) | Minimum Annual Revenue Loss | |
|---|---|---|---|---|---|
| Minnesota and Ontario Paper Co. | International Falls | 200,000 | $2.30 | $460,000 | (1) |
| Minnesota and Ontario Paper Co. | Minnesota Transfer | 4,000 | 1.85 | 7,400 | (2) |
| Minnesota Power & Light Co. | Aurora & Eveleth | 150,000 | 1.65 | 247,500 | (3) |
| Water & Light Department | Virginia | 63,000 | 1.65 | 103,650 | (4) |
| Public Utilities Commission | Hibbing | 52,500 | 1.65 | 86,625 | (5) |
| *Duluth Commercial Coal Dock Co's.* | | | | | |
| North Western Hanna | | 170,000 | | 300,000 | (6) |
| Inland Coal & Dock Co. | | 77,000 | | 115,000 | (7) |
| Carnegie Dock & Fuel Co. | | 93,000 | | 143,000 | (8) |
| Berwind Fuel Co. | | 56,000 | | 78,000 | (9) |
| | | | | $1,541,475 | |

*Loss to*

(1) Canadian Lignite —Tr. 503, 504
(2) Midwest Barge Coal —Tr. 505
(3) Truck Transportation—Tr. 521, 522, 523
(4) Truck Transportation—Tr. 537
(5) Truck Transportation—Tr. 552
(6) Truck Transportation—Tr. 660, 661
(7) Truck Transportation—Tr. 683, 685, 686
(8) Truck Transportation—Tr. 702, 703, 704
(9) Truck Transportation—Tr. 692, 693, 694, 695

LIBRARY
SUPREME COURT, U. S.

No. 961

In the

# Supreme Court of the United States

October Term, 1957

North Western-Hanna Fuel Co., Berwind Fuel Company, Carnegie Dock and Fuel Company, Inland Coal & Dock Company, Division of The North American Coal & Dock Company,
*Appellants,*

vs.

United States of America, Interstate Commerce Commission, and Railroad and Warehouse Commission of the State of Minnesota,
*Appellees,*

and

Canadian National Railway Company, et al,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

## BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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*Appellants*,

vs.

United States of America, Interstate Commerce Commission, and Railroad and Warehouse Commission of the State of Minnesota,
*Appellees*,

and

Canadian National Railway Company, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company, Duluth & Northeastern Railroad Company, Duluth, Missabe and Iron Range Railway Company, Duluth, Winnipeg and Pacific Railway Company, Great Northern Railway Company, Illinois Central Railroad Company, Minneapolis & St. Louis Railway Company, Minneapolis, Anoka and Cuyuna Range Railroad Company, Minneapolis, Northfield and Southern Railway, Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, Minnesota, Dakota & Western Railway Company, Minnesota Western Railway Company, Northern Pacific Railway Company,
*Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

# BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

## PRELIMINARY STATEMENT

Two motions to affirm the judgment of the District Court have been filed herein by the appellees—one on behalf of the United States of America and the Interstate Commerce Commission (hereafter referred to as the government appellees) and the other on behalf of all the railroads serving the State of Minnesota (hereafter referred to as the railroad appellees). The upper lake commercial coal dock companies, appellants herein, respectfully contend that the District Court erred in affirming the Order of the Interstate Commerce Commission which authorized an increase in the Minnesota intrastate freight rates and charges on bituminous coal and that the questions presented by this appeal are of great public importance and so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

## ARGUMENT

### 1. Inadequacy of Commission's Revenue Findings.

Both the government appellees and the railroad appellees contend that the findings in the instant case conform with the standards enunciated by this Court in *King v. United States*, 344 U.S. 254 (1952), for findings of the Interstate Commerce Commission in Section 13(4) proceedings and that the recent case of *Chicago, M., St. P. & P. R. Co. v. Illinois*, 355 U.S. 300 (1958), referred to hereinafter as the *Milwaukee case*, is not applicable. However, both appellees fail to point out the facts which distinguish the *King case* from the instant case and fail to recognize the facts which

demonstrate the applicability of the recent *Milwaukee case*.

In the *King case* this Court confined its discussion to the action of the Florida Commission denying the final 5% increase on all intrastate freight rates, which 5% increase the Interstate Commerce Commission had authorized on interstate freight rates. *King v. United States*, 344 U.S. 254, 73 S.Ct. 259, 262 (ft. 6) (1952). In the instant case the Minnesota intrastate freight rates for only eight separate commodities were involved before the Interstate Commerce Commission; and on this appeal the Minnesota intrastate freight rates on only bituminous coal are involved. Thus, it is obvious that the *King case*, on the facts, is distinguishable from the instant case.

Furthermore, in the *King case* this Court stressed the point that there was a finding of the Interstate Commerce Commission that all of the Florida intrastate rates and charges were abnormally low and were not contributing their fair share to the revenues required by the railroads to render adequate and efficient service. In the instant case, there was no similar finding as to the entire Minnesota operation. Furthermore, it was this exact point which this Court noted in the *Milwaukee case* and thereby distinguished the *Milwaukee case* from the *King case*. In referring to the lack of revenue findings in the *Milwaukee case*, this Court stated as follows:

> "It should be noted that in *King v. United States, supra,* the Court adverted to those very factors among the ICC's findings whose absence in the present case we find to be a fatal defect. The Court there emphasized the ICC finding that the entire intrastate traffic, freight and passenger, constituted a revenue drain upon the carrier's revenues from interstate traffic. Since the Commission has not in this case found whether or not the commuter rates, viewed in the light of the intrastate operation as a whole, constitute an undue revenue discrimination against the Milwaukee Road's interstate

operations, the judgment of the District Court in remanding the case to the Commission for further consideration must be affirmed."

In the *King case* this Court found that the Interstate Commerce Commission did not rely merely upon a disparity between the interstate and intrastate rates and that, therefore, the revenue findings referred to in the case of *State of North Carolina v. United States*, 325 U.S. 507, 65 U.S. 1260, 1265 (1945), were not required. However, in the instant case, the finding of the Interstate Commerce Commission, that the intrastate freight rates and charges on bituminous coal are abnormally low, is based solely upon a mere disparity between interstate and intrastate rates on this commodity since the railroad appellees failed to introduce any evidence on this issue except certain interstate and Minnesota intrastate freight rates on bituminous coal. (Jurisdictional Statement, pp. 26-27.)

The above discussion shows that the instant case is distinguishable from the *King case* in many important features. And, certainly, in view of the recent *Milwaukee case, supra*, the appellees have lost whatever comfort they might have previously hoped for from the *King case*.

The *Milwaukee case* involved an order of the Interstate Commerce Commission increasing intrastate passenger fares for the Milwaukee Road's Chicago suburban commuter service. Prior to the issuance of the Interstate Commerce Commission's order, the State Commission had denied the petition of the Milwaukee Road to increase such fares. Thus, the *Milwaukee case* presented the "problem of adjusting State and federal interests in the regulation of intrastate rates." This Court affirmed the order of the District Court remanding the case to the Interstate Commerce Commission for further consideration on the grounds that the Interstate Commerce Commission failed to make findings as to the total of

indirect costs and taxes to which contribution was to be made by the commuter fares and also as to the revenue contributions made by the other intrastate services.

In the instant case the Interstate Commerce Commission failed to make findings as to the total railway operating income of the railroad appellees to which contribution is to be made by the Minnesota intrastate rates on bituminous coal and also as to the revenue contributions made by the other intrastate services. The appellants contend that the *Milwaukee case* is controlling herein and that, therefore, the order of the Interstate Commerce Commission increasing Minnesota intrastate rates on bituminous coal should be annulled and set aside since in the instant case the Interstate Commerce Commission failed to make the findings required in the *Milwaukee case*. The government appellees and the railroad appellees, however, contend that that *Milwaukee case* is distinguishable from the case at bar (Govt. pp. 11-12; Rys. pp. 9-11).

First, the government and railroad appellees argue that the *Milwaukee case* did not have as its genesis a nation-wide general revenue increase case such as *Ex Parte 175* which is the basis for the instant case and that, therefore, the decision in the *Milwaukee case* is not applicable in the instant case (Govt. p. 11; Rys. p. 9). Analysis reveals that there is no merit to this argument. In the *Milwaukee case* this Court discussed the powers conferred upon the Interstate Commerce Commission under Section 13(4) of the Interstate Commerce Act and stated as follows:

> "The occasion for the exercise of the federal power asserted by §13(4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate share of the revenues necessary to pay a carrier's operating cost and to yield a fair return. When intrastate revenues fall short of producing their fair proportionate share of required total revenues, they work an

undue discrimination against interstate commerce, and the ICC may remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce. *Illinois Commerce Comm'n v. United States*, 292 U.S. 474, 479; *Wisconsin R. Comm'n v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 586; *United States v. Louisiana*, 290 U.S. 70, 75. In determining whether an undue revenue discrimination against interstate commerce is caused by intrastate rates, the ICC may consider, 'among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service,' a standard written into 49 U.S.C. §15a(2). *King v. United States*, 344 U.S. 254, 264. No formal requirements are prescribed for the findings to be made by the ICC under §13(4). *United States v. Louisiana*, 290 U.S. 70, 80. Reasonable determinations suffice. *Florida v. United States*, 292 U.S. 1, 9. But the justification for the exercise of this exceptional federal power to interfere with intrastate rates must be made definitely and clearly apparent. *Florida v. United States*, 282 U.S. 194, 212."

All of the cases above cited and relied upon by this Court in the *Milwaukee case* pertain to cases which involved general revenue proceedings. Thus, this Court in the *Milwaukee case* did not distinguish between Section 13(4) cases which had as their genesis a nation-wide general revenue case and those which did not involve such general revenue cases as *Ex Parte 175*.

Furthermore, this Court in its decision distinguished the *King case*, relied upon herein by the government and railroad appellees, from the *Milwaukee case*. This Court did not distinguish the two cases on the basis argued for by the appellees but on the basis that in the *King case* the Interstate Commerce Commission viewed the entire Florida intrastate operation, freight and passenger, and made a finding that the entire intrastate operation constituted a revenue drain upon the revenues derived by the railroads from interstate

traffic but in the *Milwaukee case* the Interstate Commerce Commission failed to find whether or not the commuter fares constituted a revenue drain upon the carriers' interstate revenues in view of the entire intrastate operation as a whole. Thus, it is clear that this Court in the *Milwaukee case* did not distinguish between Section 13 cases based on general revenue proceedings and such cases not based on general revenue proceedings in determining the principal findings which are necessary to support an order of the Interstate Commerce Commission increasing intrastate rates pursuant to the authority conferred upon it under Section 13(4) of the Interstate Commerce Act.

The railroad appellees also argue that the instant case is distinguishable from the *Milwaukee case* because in the instant case the Interstate Commerce Commission relied upon *Ex Parte 175*, a nation-wide general revenue case, wherein the Interstate Commerce Commission had taken into account the total revenue needs of the railroads from both interstate and intrastate operations and that in the *Milwaukee case* the Interstate Commerce Commission was not relying upon such a general revenue case (Ry. p. 10). The case law does not support this theory of the railroad appellees. In *Mississippi Public Service Com'n v. United States*, 124 F. Supp. 809, 815 (S.D. Miss. 1954) (affirmed 349 U.S. 908), the Court stated as follows:

> "The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. *There must be a finding based upon substantial evidence after full investigation* that the intrastate rates are abnormally low and that the traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this

> effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers." (Emphasis added.)

If the Interstate Commerce Commission could determine in a nation-wide general revenue proceeding that all intrastate rates should be increased to the same extent as interstate rates, there would be no need for Section 13(4) proceedings as provided for by Congress. This argument of the railroad appellees is contrary to the language of Section 13(4) of the Interstate Commerce Act which provides for a full hearing in order to determine whether or not the intrastate rates in question cause undue discrimination against interstate commerce. *Mississippi Public Service Com'n v. United States, supra.*

The railroad appellees further contend that in the instant case the Interstate Commerce Commission had determined the justness and reasonableness *of the increases* on each and every commodity and that in the *Milwaukee case* the Interstate Commerce Commission had not made such a determination. Findings as to the justness and reasonableness *of the increases* on commodities are irrelevant. When intrastate rates are attacked on the basis that they cause undue, unreasonable or unjust discrimination against interstate commerce, the Interstate Commerce Commission must make findings that the interstate rates themselves, not the increases, are reasonable. *Georgia Public Service Comn. v. United States*, 283 U.S. 765, 770. Although general increases are found to be reasonable, particular increased rates are not thereby found to be just and reasonable. *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637, 669. Thus, in the instant case and the *Milwaukee case*, both Section 13(4)

proceedings, there must be findings that the interstate rates in question are just and reasonable and the fact that the Interstate Commerce Commission in the instant case had previously found in *Ex Parte 175* that the general increases on interstate rates were just and reasonable is not a relevant factor distinguishing the two cases for purpose of determining whether or not the findings were sufficient to uphold the order of the Interstate Commerce Commission.

The railroad appellees further argue that the instant case and the *Milwaukee case* are distinguishable because in the instant case the Interstate Commerce Commission found that the increased intrastate freight rates and charges will contribute "not more than a just proportion of the respondents total railway operating income" and in the *Milwaukee case* the Interstate Commerce Commission found that the increased commuter rates will "make a fair contribution toward respondent's indirect costs and return on investment." This Court in the *Milwaukee case* did not affirm the decision of the District Court remanding the case to the Interstate Commerce Commission for further consideration on the basis that the finding as to contribution by the intrastate commuter fares was not couched in the same language as used in finding 6 in the *King case*—"* * * will constitute not more than a fair proportion of respondents' total income," which finding is similar to finding 5 in the instant case. In the *Milwaukee case* this Court, in footnote 8 in regard to the finding as to contribution, stated as follows:

> "[8]We agree with the District Court that that portion of the prescribed increases designed to produce $77,000 annually as a contribution to indirect costs and taxes is not based upon adequate findings. There is no finding of the total of indirect costs and taxes to which contribution is to be made, nor any finding from which we may infer how the ICC derived its conclusion that a $77,000 contribution was fair. It is axiomatic that to

> know whether something is a fair proportionate part of something else, we must be told what the something else is."

Whether the contribution finding is stated in terms of indirect costs and return on investment or in terms of operating income, the criticism of this Court in the *Milwaukee case* is applicable as to findings in a Section 13(4) proceeding. In the instant case, there is no finding as to the total amount of revenues required by the railroad appellees to operate efficiently, nor as to the total to be contributed by intrastate rates and charges as a whole, and, therefore, it is impossible to ascertain whether or not the revenues allegedly to be derived from the increased intrastate rates on bituminous coal will contribute not more than a just proportion of the railroads' total operating income. The principle enunciated in the *Milwaukee case* is equally applicable here—"to know whether something is a fair proportionate part of something else, we must be told what that something else is."

In regard to the finding that this Court found to be necessary in the *Milwaukee case*—whether or not the intrastate rates, viewed in the light of the entire intrastate operation, constitute an undue, unreasonable or unjust revenue discrimination against interstate commerce, the government appellees argue that if the Interstate Commerce Commission is required to segregate interstate and intrastate revenues and expenses in Section 13(4) proceedings, the proceedings would be greatly delayed (Govt. pp. 5-6). The government appellees completely overlook the unfortunate position of intrastate shippers if such revenue findings are not required in such cases as in the instant case where intrastate shippers of only one commodity challenge the validity of an order of the Interstate Commerce Commission increasing intrastate freight rates. The adoption of the government appellees' argument would be equivalent to holding that

once the Interstate Commerce Commission authorizes a general revenue increase on interstate rates, ipso facto the same increase should be applied on all intrastate rates. But this Court has held that a mere disparity between interstate and intrastate rates is not sufficient basis for the exercise of the Interstate Commerce Commission's power to alter intrastate rates. *State of North Carolina v. United States,* 325 U.S. 507 (1945). The very nature of general revenue proceedings requires that the Interstate Commerce Commission must provide a savings clause in its order for the modification and adjustment of particular rates. *Georgia Public Service Commission v. United States,* 283 U.S. 765, 772; *United States v. Louisiana,* 290 U.S. 70, 76. In approving general rate increases, the Interstate Commerce Commission merely finds that the general increases are reasonable but does not find that the particular increased rates are just and reasonable. *Coal from Illinois to Alton and East St. Louis,* 274 I.C.C. 637, 669. If interstate rates as increased in a general revenue case are not necessarily just and reasonable rates, it would certainly be unfair and unjust to intrastate shippers to hold that intrastate rates without the general increase are unduly low and cause undue, unreasonable or unjust discrimination against interstate commerce without further evidence showing that the intrastate rates in question are unduly low and are not contributing their fair share to the railways' operating income when viewed in the light of the entire intrastate operation. The occasion for the exercise of the power of the Interstate Commerce Commission under Section 13(4) is not to invoke uniformity of interstate and intrastate rates but to effectuate a fair proportionate share by intrastate traffic to the railways' total operating income. *Chicago, M. St. P. & P. R. Co. v. Illinois,* supra, p. 305. The convenience or inconvenience to the Interstate Commerce Commission is certainly not a proper factor to consider in determining

whether or not the intrastate rates cause undue discrimination against interstate commerce; the justification for the exercise of its power must "clearly appear." *Florida v. United States,* 282 U.S. 194, 212. Furthermore, the *King case* is not authority for the position of the government appellees since in that case this Court found that the Commission did not rely merely upon a disparity between interstate and intrastate rates and the sufficiency of the evidence to support the findings was not questioned. *King v. United States, supra,* 73 S.Ct. 259, 269-270.

### 2. Inadequacy of Interstate Commerce Commission Findings with Respect to the Interstate Rates on Bituminous Coal.

The government appellees argue that a finding that amounts and percentages by which interstate rates were authorized to be increased in *Ex Parte 175* are just and reasonable is equivalent to a finding that the increased interstate rates on bituminous coal are just and reasonable since the Interstate Commerce Commission in *Ex Parte 175* "authorized a specified maximum increase in these rates" (Govt. p. 7). The government appellees fail to cite any authority for their above argument.

The appellants respectfully contend that a finding as to the reasonableness of a general increase in interstate rates is not equivalent to a finding that the interstate rates on bituminous coal as increased are just and reasonable. In the case of *Coal from Illinois to Alton and East St. Louis,* 274 I.C.C. 637, 669, the Interstate Commerce Commission held:

> "Coming now to consideration of the reasonableness of the rates before us: Before entering a 13th Section order requiring state rates to be increased to the level of interstate rates, *we must first determine that the interstate rates are just and reasonable* and that the

intrastate rates, when so increased, will be just and reasonable." (Emphasis added.)

and at page 670 of the same decision:

"Respondents' assumption, that the reasonableness of the present interstate rates is not open to question because rates found reasonable 20 years ago have taken only the general rate increases, is without fundation. In approving both of the general rate increases relied upon, we said that the rates increased as permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Company v. A. T. & S. F. Ry. Co.*, 284 U.S. 370. The effect of that statement is equivalent to saying that while general increases were found reasonable, *such general approval does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate.*" (Emphasis added.)

It should also be noted that in *Jacksonville Chamber of Commerce v. A. & W. P.*, 211 I.C.C. 509, 513, the Interstate Commerce Commission held:

"Complainants argue that the interstate rates considered may be deemed to be just and reasonable for the purpose of using those rates in the removal of any undue prejudice found to exist unless there is proof in this record that the interstate rates are unreasonable. We cannot agree with this contention. When we act affirmatively to fix the rate, or the maximum or minimum rate provided by this section of the Act, we must be governed by the requirement of Section 1 of this Act that such rates be reasonable. *Reasonableness of a rate is a question of fact which is susceptible of proof and we cannot assume the fact of reasonableness on the basis of absence of proof to the contrary.*"

"In a case of this character, Section 13(4), it is therefore *a part of complainant's case to offer sufficient evidence to establish the reasonableness of the rates which are to be maintained* * * *." (Emphasis added.)

From the above cases, it is apparent that a finding that general increases are reasonable is not the same as the re-

quired finding in Section 13(4) cases that the increased interstate rate on a particular commodity is just and reasonable. Since there was no finding in the instant case that the increased interstate rates on bituminous coal are just and reasonable, the order of the Interstate Commerce Commission increasing the intrastate rates on bituminous coal should be annulled and set aside on that ground alone. (Jurisdictional Statement pp. 20-21.)

### 3. Insufficiency of Evidence to Support the Findings.

At this juncture appellants wish to stress another fundamental distinction between the instant case and *King v. United States*. In the latter, this Court, at page 272, stated:

> "No question has been raised here as to the adequacy of the evidence upon which any of the findings are based."

In this case, in addition to attacking the adequacy of the findings, appellants submit that the findings discussed below which were made were not supported by substantial evidence of record.

The government appellees erroneously contend that the appellants do not challenge the sufficiency of the evidence in regard to the finding that the increased intrastate rates on bituminous coal "will provide not more than a just proportion of the respondents' total railway operating income" (Govt. pp. 12-13). In their jurisdictional statement, the appellants did contend that the Interstate Commerce Commission failed to make the necessary findings showing (1) the total amount of revenues required by the railroad appellees to render adequate and efficient railway transportation service, (2) the amount to be contributed by the increased intrastate freight rates on bituminous coal, and (3) the amount contributed by Minnesota intrastate traffic which would constitute a fair proportion of the railroads' total operating income (pp. 13-18). The appellants further con-

tend that the railroad appellees failed to introduce evidence showing (1) the system operating revenues and expenses for all the railroad appellees—either individually or as a group—and (2) the Minnesota intrastate operating revenues and expenses for all railroad appellees—either individually or as a group (Jurisdictional Statement p. 18). The appellants also have demonstrated that the evidence showed that the then existing intrastate freight rates were not abnormally low but were contributing their fair share to the railroads' total revenue (Jurisdictional Statement p. 26). Obviously, the appellants challenged the sufficiency of the evidence not only to support the revenue findings that are absent in the instant case but also to support the ultimate finding of the Interstate Commerce Commission that the increased intrastate freight rates on bituminous coal will provide not more than a just proportion of the total railway operating income.

The government appellees contend that the evidence of record supports the finding that "the transportation conditions incident to the intrastate operation of freight in Minnesota are not more favorable than those between Minnesota and interstate points" because the evidence shows that there is no difference from an operating standpoint between the two classes of traffic, that interstate and intrastate shipments were intermingled on the same trains, and that a greater percentage of intrastate shipments moved on local trains than on through trains (Govt. p. 13). The pertinent point here is that the government appellees fail to discuss whether or not there is evidence of record showing a similarity of interstate and intrastate transportation conditions *applicable to bituminous coal.*

The appellants again respectfully contend that there is no evidence of record showing that the transportation conditions under which bituminous coal moves in interstate and

intrastate traffic are substantially identical with respect to all factors bearing upon the reasonableness of rates. The government appellees rely on exhibits 13 and 14 for their position on this issue; however, a railroad witness testified that he did not know of any shipments of bituminous coal from the upper lake commercial docks during the test period covered by these two exhibits (Tr. 343). Furthermore, there is strong evidence of record that the conditions incident to motor carrier transportation of bituminous coal from the Duluth docks to Minnesota intrastate points are extremely favorable because of the all-weather highways available and the relatively short distances involved (Tr. 533-34; 654). There is no evidence that the same adaptability for movement of bituminous coal by truck applied to interstate shipments of bituminous coal. The existence of truck competition in intrastate traffic is an important factor to consider in determining whether or not the transportation conditions of interstate and intrastate traffic are similar. *Intrastate Rates on Bituminous Coal*, 188 I.C.C. 342, 348; *Standard Paper Mfg. Co., Inc. v. Alabama G. S. R. Co.*, 196 I.C.C. 569, 575. In *Jacksonville Chamber of Commerce v. A. & W. P. R. Co.*, 211 I.C.C. 509, 511, the Interstate Commerce Commission stated as follows:

> "* * * Since truck operations have become a real factor in the transportation field, we have consistently regarded rail transportation, where truck competition is encountered, to be performed under circumstances and conditions which are dissimilar to those instances in which truck competition does not exist at all or to the same extent. *Rate Structure Investigation*, Part 3, *Cotton*, 174 I.C.C. 9, 176 I.C.C. 249."

When viewed in the light of the entire record, the evidence is not sufficient to warrant a finding that the transportation conditions for bituminous coal are identical in both interstate and intrastate traffic. It is irrelevant what the trans-

portation conditions may be for other commodities in interstate and intrastate commerce.

The government appellees contend that the District Court properly stated that the Interstate Commerce Commission was in a "far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers" in regard to the finding that the railroads' revenues would be substantially increased as a result of the increased intrastate rates on bituminous coal (Govt. p. 14). The appellants, however, claim that the testimony of the railroad witnesses is so extremely weak as not to be substantial evidence, their opinions being based upon the assumption that the same volume of traffic as before would move on the increased intrastate freight rates for bituminous coal (Ex. 12); that the Minnesota Railroad and Warehouse Commission—which found that intrastate freight rates on bituminous coal, if increased, would accelerate conversion to other fuels and diversion to other modes of transportation—was in a better position to evaluate the effect of the proposed increase (Jurisdictional Statement, pp. 66, 71), and that several executives of coal dock companies, who are in a position to control the shipment of large quantities of bituminous coal in Minnesota intrastate traffic, testified contrary to the finding and their testimony should be given considerable weight. The evidence to support this finding is not sufficient when viewed in the light of the prevailing rule of law. *Mississippi Public Service Com'n v. United States, supra,* p. 816.

With reference to the sufficiency of evidence to support the finding that the intrastate freight rates on bituminous coal are unduly low, the government appellees state that the history of Minnesota intrastate bituminous coal rates and the interstate freight rates on bituminous coal are sufficient evidence to support the finding (Govt. pp. 14-15). The govern-

ment appellees do not attempt to demonstrate the relevancy of the history of the Minnesota intrastate freight rates on bituminous coal in determining the reasonableness of such rates; and it is indeed doubtful in what way such history would be relevant in determining this issue. As to a comparison of the interstate and intrastate freight rates on bituminous coal, this Court has stated on numerous occasions that a mere disparity between interstate and intrastate rates is not a sufficient basis for a finding that the intrastate rates are abnormally low. *State of North Carolina v. United States,* 325 U.S. 507, 516; *Florida v. United States,* 282 U.S. 194, 211-212; *Mississippi Public Service Com'n v. United States,* 124 F. Supp. 809, 814. Obviously, in view of the evidence submitted by the appellants showing the high level of earnings by the railroads from the then existing intrastate freight rates on bituminous coal, there is no evidence in the record to support this finding that the intrastate rates on bituminous coal are abnormally low; in fact, the evidence is to the contrary. (Jurisdictional Statement, pp. 25-26.)

**4. Prejudicial Errors of the Interstate Commerce Commission as to Admissibility of Evidence and Scope of Cross Examination.**

In regard to appellants' contention that the examiner received exhibits without proper foundation and unlawfully prohibited appellants' cross examination, acts which were prejudicial to the appellants, the government and railroad appellees merely refer to the statement of the District Court in its decision (Govt. p. 15, Rys. p. 12). The appellants again respectfully contend that the erroneous rulings of the examiner were highly prejudicial to the appellants and constituted a denial of a fair hearing to the appellants in flagrant violation of Section 7(c) of the Administrative Procedure Act, 5 *U.S.C.* 1006(c) (Jurisdictional Statement, pp. 27-30).

For example, Exhibit 14 was made pursuant to the following direction:

> "In connection with this study *we must show* that the cost of handling intrastate traffic in local trains exceeds the cost of handling similar traffic in through trains. This will be possible even though the volume of intrastate traffic may be exceeded by the volume of interstate traffic in the local trains because the wage costs are divided among the lesser number of cars that are usually handled in local trains." (Exhibit 31, p. 4.) (Emphasis supplied.)

In connection with the wage data supplied for Exhibit 14, the following instruction was given:

> *"Include only such special allowance payments for which under schedule rules is a part of a road trip. Do not include under any circumstances vacation-pay, deadhead miles, held-away-from-home terminal pay, or time slips for work not performed (such as run-arounds)."* (Exhibit 31, p. 5.)

The obvious reason for eliminating the above payments was to keep the wage costs for through freight trains lower than for local freight trains since the railroad appellees argued that a greater percentage of intrastate traffic moved on local trains and, therefore, the wage costs for intrastate traffic was greater than for interstate traffic. Since data unfavorable to the railroad appellees' predetermined conclusion was eliminated from the wage cost study, Exhibit 14, it was important to the appellants to have an opportunity to cross-examine the witnesses of the railroad appellees in regard to the instructions which they received for the preparation of this exhibit and as to the costs incurred for the payment of the special allowances which were eliminated from the study.

If proper cross examination had been permitted, appellants contend that they would have shown (1) that wages paid crewmen and trainmen on both local and through freight

trains are computed on either eight-hour day or 100-mile basis, whichever is reached first; (2) that crewmen and trainmen on through trains generally complete their services for 100 miles in less than eight hours; (3) that crewmen and trainmen on through trains generally worked less hours for the wages received than crewmen and trainmen on local trains; (4) that in Exhibit 14 wages were not computed on the basis of hours actually worked but on an arbitrary basis of eight hours for crewmen and trainmen on both local and through trains; (5) that if in Exhibit 14 the hourly rate of wages paid crewmen and trainmen on local and through trains had been computed on the basis of hours actually worked, the average cost of wages per hour for crewmen and trainmen on through trains would have been greater than the average cost of wages per hour for employees on local trains; and (6) that since a larger percentage of interstate traffic moved in through trains rather than in local trains, the average cost of wages for interstate traffic would have been shown to be greater than the average cost of wages for intrastate traffic on the basis of the rate of pay received by employees for the hours actually worked.

Thus, being allowed proper cross examination, appellants would have shown that Exhibit 14 was not an accurate and fair comparison of wages paid crews on through and local freight trains and that the conclusion argued for by the railroad appellees from Exhibit 14, and adopted by the Interstate Commerce Commission, was erroneous.

## 5. Savings Clause Is Insufficient to Prevent Deprivation of Property Without Due Process of Law.

Neither the government appellees or the railroad appellees in their Motions to Affirm discussed the following question:

> "7. Whether the savings clause in the Report, Findings and Order of the Interstate Commerce Commission is sufficient to prevent the deprivation of appellants' property without due process of law as guaranteed under the Constitution of the United States since the appellants are limited therein to apply for modification of the increased intrastate freight rates and charges on bituminous coal on the sole ground that such rates and charges are not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act, thereby denying the appellants the right to obtain reparations if the increased intrastate rates and charges on bituminous coal are found to be unjust and unreasonable or otherwise unlawful—which right is protected in the general revenue proceeding involving interstate rates and charges which is the basis of this action."

The appellants therefore respectfully refer this Court to its previous discussion of this question (Jurisdictional Statement, pp. 30-32) and request this Court to note probable jurisdiction in the instant case and determine the effect of a savings clause in an Order of the Interstate Commerce Commission in a Section 13(4) proceeding as to the property rights of intrastate shippers affected by such order.

## CONCLUSION

Appellants' Jurisdictional Statement has set forth the substantial questions involved in this appeal, which questions affect the determination of rights of shippers, state commissions and the general public who are all greatly affected by the increasing number of general revenue cases brought by the rail carriers before the Interstate Commerce Commission and also by the increasing number of Section 13 cases as outgrowths of the general revenue proceedings. In the instant case the Interstate Commerce Commission increased intrastate rates for bituminous coal on the sole basis that the intrastate rates do not bear the same increase as authorized by it for interstate rates and usurped the primary power of the state to regulate its intrastate rates since neither the findings nor the evidence are sufficient to uphold the order of the Interstate Commerce Commission.

Appellants have further shown in their Jurisdictional Statement the manner in which this proceeding was conducted, accepting in evidence voluminous, statistical exhibits without proper foundation and curtailing cross examination of witnesses who vouch for the accuracy of such statistical exhibits. Such erroneous rulings are highly prejudicial to the protesting shippers who thereby were deprived of the opportunity to ascertain the relevancy and accuracy of such statistical exhibits. Appellants have also shown that there is grave doubt as to what protection the shippers are given by the savings clause in this order increasing intrastate rates in a Section 13(4) proceeding so as to prevent the deprivation of property without due process of law.

The questions submitted to this Court are of great public importance and are so substantial as to require plenary consideration, with briefs on the merits and oral argument. Appellants request that the motions of the appellees to

affirm be denied and that this Court note probable jurisdiction.

Respectfully submitted,

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No. 861

# In the Supreme Court of the United States

OCTOBER TERM, 1957

NORTH WESTERN-HANNA FUEL CO., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA*

## MOTION TO AFFIRM

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Statute:

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 861

NORTH WESTERN-HANNA FUEL CO., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA*

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## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is an appeal from the judgment of a three-judge district court dismissing a complaint which prayed that the court adjudge unlawful and set aside a "report, decision and order" of the Interstate Commerce Commission. The complaint attacked the Commission's determination, made in a Section 13 (4) proceeding, that the Minnesota intrastate rates on bituminous coal which were then in effect resulted in

unjust discrimination against interstate commerce, and that this discrimination should be removed by making the same increase in these intrastate rates which the Commission had authorized for interstate commerce some five years earlier.[1]

The report of the Commission, issued on April 23, 1957, stated that it would enter an order carrying its findings into effect unless notified, within 30 days after service of the report, that the Railroad and Warehouse Commission of the State of Minnesota ("Minnesota Commission") would permit the increase found to be necessary to remove unjust discrimination. 300 I. C. C. 201, 224. The Minnesota Commission, by its report and order of May 20, 1957, authorized this increase, but stated that while it previously had found the requested increase not justified, "it is reluctant to pursue the matter further in the Courts" (J. St. 52). Accordingly, no "order" was issued by ICC. However, the district court held that the ICC determination "had the same effect" as a formal order and that it was therefore subject to review under the holding of this Court in *Frozen Food Express* v. *United States,* 351 U. S. 40, 43–44 (J. St. 41).[2]

The present case grew out of a Commission proceeding, designated *Ex parte 175,* instituted in Janu-

[1] Diamond Match Company, which intervened as a plaintiff, attacked a like determination with respect to Minnesota intrastate rates on short logs or wood bolts (J. St. 37), but the appeal puts in issue only the Commission's determination of the proper and necessary intrastate rates on bituminous coal.

[2] We call attention to the facts bearing on the district court's jurisdiction under 28 U. S. C. 1336, but do not contend that the ICC determination is not reviewable.

ary 1951 by the country's major railroads seeking a general increase in interstate freight rates to provide revenues to offset sharply higher operating costs. In April 1952, the Commission authorized a 15% increase in basic freight rates, subject to specified exceptions and limitations.[3] For bituminous coal, the increase authorized was 12%, subject to a maximum of 40¢ per net ton, and for rail-water-rail transportation the 40¢ maximum was apportioned equally to the initial and final rail haul. 284 I. C. C. at 663. Since the coal which appellants handle at their docks at Duluth, Minnesota, moves by rail from eastern mines to Lake Erie ports and thence by water to Duluth, the maximum increase allowed on rail shipments from Duluth was 20¢ per net ton (J. St. 6–7).

The railroads operating in Minnesota applied to the Minnesota Commission for authority to extend to intrastate commerce the interstate rate increases authorized in the *Ex parte 175* proceeding, and the state commission, after some delay, granted the requested authority except for coal, forest products, sugar beets and certain other commodities. In the meantime, ICC, on the request of the affected railroads, instituted a Section 13 investigation of Minnesota intrastate rates. After the taking of evidence, the filing of the hearing examiner's proposed report, and argument before the full Commission, ICC issued a report in which it found, among other things, that

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[3] 284 I. C. C. 589, 662–666. This authorization followed two interim authorizations of smaller percentage increases (280 I. C. C. 179; 281 I. C. C. 557), and the authorization, originally granted for a limited period of time, was ultimately granted without time limitation (289 I. C. C. 395; 297 I. C. C. 17, 51).

Minnesota intrastate bituminous coal rates cause an undue and unjust discrimination in interstate commerce. *Minnesota Intrastate Freight Rates and Charges,* 300 I. C. C. 201, 202, 207–208, 223–224.

After the Minnesota Commission had authorized the rate increase which ICC had thus found to be requisite (*supra,* p. 2), appellants filed in the court below a complaint attacking the validity of the ICC determination, and the court enjoined, pending its determination of the issues raised by the complaint, application and enforcement of the ICC decision and the resulting order of the Minnesota Commission insofar as they related to bituminous coal. As a result, increased intrastate rates on bituminous coal did not go into effect until January 26, 1958 (J. St. 12), more than five and a half years after the corresponding increase in interstate rates.

The district court unanimously held that the ICC findings were adequate and not materially different from those held to be sufficient in *King* v. *United States,* 344 U. S. 254, and that the findings had the support of substantial evidence (J. St. 41–44).

## ARGUMENT

### I

The across-the-board rate increase which the railroads sought in the *Ex parte 175* proceeding was designed to meet the serious problem created by mounting costs of operation in the period of rising prices which followed World War II. Higher unit operating costs can be partly overcome by greater operating efficiency, usually entailing purchase of new equip-

ment or other capital expenditures. But, apart from such savings, additional revenue is needed to keep income and outgo in balance as operating costs go up. The railroads' ability to expand traffic volume, and hence revenue, is severely limited by competition from other modes of transportation. Higher traffic charges remain as an undesirable but apparently necessary means of securing needed additional revenue.

There is no question as to the statutory authority of the Interstate Commerce Commission to grant nationwide rate increases. The National Transportation Policy declared by Congress directs the Commission to administer the Interstate Commerce Act so as to develop a transportation system by rail, water and highway adequate to meet the needs of the commerce of the United States, the postal system and national defense. And Section 15a of the Act requires the Commission, in determining reasonable rates, to consider the need of the railroads for revenues sufficient to enable them to provide adequate and efficient service.

Since the railroads' entire operations, both interstate and intrastate, dictate their over-all revenue needs, intrastate commerce would be unduly favored as against interstate commerce if the latter had to bear the entire burden of rate increases granted to provide needed additional revenue. Section 13 (4) of the Act clothes the Commission with power to prevent this unjust discrimination by prescribing intrastate rates which will remove the discrimination.

This Court, in passing upon Section 13 (4) proceedings instituted in order to compel intrastate com-

merce to make its fair contribution to over-all railroad revenue needs, has consistently held that the statutory objective would be defeated if the section were interpreted as imposing requirements respecting proof and findings so onerous as to prevent prompt and effective administration and enforcement of the section.[4] If the Commission were required, in order to make a valid Section 13 (4) order, to segregate interstate and intrastate revenues and expenses, either railroad by railroad or for the involved railroads taken as a group (or if it were required to determine, with respect to the intrastate rates in dispute, the dollar contribution of higher rates respectively made by interstate and intrastate commerce, railroad by railroad or for the railroads as a group), the complexity of the proceeding would postpone corrective administrative action for many years and might, indeed, paralyze the Commission's administrative arm. Any existing unjust discrimination would continue throughout this time lag, and no retroactive order could require recoupment from intrastate commerce.

This case shows that even under the tests of a valid Section 13 (4) order which this Court has sanctioned, intrastate rates which the Commission has found to be unjustly discriminatory remained in effect for over five and a half years (*supra*, p. 4). In *Public Serv-*

[4] *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588; *United States* v. *Louisiana*, 290 U. S. 70, 75–76, 78–79; *Florida* v. *United States*, 292 U. S. 1, 9; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483; *King* v. *United States*, 344 U. S. 254, 275.

*ice Commission of Utah* v. *United States,* No. 15, this Term, the time lag was more than four years.[5]

II

Appellants' major contention appears to be that the Commission's order is not supported by adequate findings. They urge inadequacy in the findings as to the reasonableness of the interstate and the prescribed intrastate bituminous coal rates (J. St. 20–23) and inadequacy in what they term the "Revenue Findings" (J. St. 13–18).

The Commission found that interstate rates, increased as authorized in *Ex parte 175,* are "just and reasonable".[6] This is an explicit finding as to the reasonableness of the interstate rates on bituminous coal, since the Commission in *Ex parte 175* authorized a specified maximum increase in these rates. Likewise the Commission found that the prescribed intrastate bituminous coal rates will be reasonable. It found (J. St. 40): "The establishment of increased intrastate rates and charges as provided in finding 4[7] will not result in unreasonable rates or charges * * *". A

[5] From April 1952, when a 15% increase in interstate rates was authorized in the *Ex parte 175* proceeding, to May 1956, when the district court upheld the Commission's 13 (4) order (146 F. Supp. 803). See Gov. Br. in No. 15, this Term, fn. 5, p. 6.

[6] Finding 2 reads: "The amounts and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable" (J. St. 39).

[7] Finding 4 refers to the Minnesota intrastate rates covered by finding 3, which rates include (J. St. 39) those on "bituminous coal."

finding that certain rates will not be unreasonable is a finding that they will be reasonable.

Appellants attack the Commission's so-called "Revenue" findings upon the ground that the Commission failed to make the following essential findings: "the total amount of revenues required by the railroad defendants to render adequate and efficient railway transportation service" (J. St. 13); the "amount of revenue" from intrastate bituminous coal shipments which would constitute a fair proportion of the total railway operating income of these railroads (*id.* 15); the "total amount of revenue" received by these railroads from "the entire movement of intrastate traffic in Minnesota" (*id.* 15–16); the results as to "each railroad" of its "entire intrastate operation in Minnesota" (*id.* 16), *i. e.*, "the entire intrastate traffic—freight and passenger—for each railroad" (*id.* 17).

The findings of the Commission in this case are of the same scope and character as those which this Court held to be adequate to sustain a Section 13 (4) order in *King* v. *United States,* 344 U. S. 254.[8] The Court there did not find the dollar amount of revenue which the railroads operating in Florida required in order to render adequate and efficient rail transportation service, or the dollar amount of revenue from Florida intrastate shipments which would constitute a

[8] The order which was reviewed prescribed not only a 5% increase for Florida intrastate rates generally but also larger increases for certain commodities on which there had been either no intrastate increase or an intrastate increase more than 5% less than the interstate increase. See 344 U. S. at 258, fn. 5. The order reviewed in *King* therefore prescribed, like the order in issue here, intrastate rates on particular commodities.

fair proportion of the Florida railroads' total operating income, or the dollar amount of revenue received by the Florida railroads from their total Florida intrastate operations, or the result of the entire Florida intrastate operations of each railroad operating in that state.[9] The Court, after referring to certain of the Commission's basic findings, said (344 U. S. at 275):

> More is not needed. It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case.

The Court likewise quoted with approval (344 U. S. at 273) the following from *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483–484:

> Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues.

On the day this Court decided the *King* case, it vacated a district court judgment which had set aside a Section 13 (4) order because the Commission had failed to find the amount of total revenue, or the amount of revenue from Montana intrastate traffic, required to enable the affected railroads to operate

[9] See the findings of the Commission set forth in fn. 13, 344 U. S. at 267–269.

efficiently.[10] Following remand of the cause for further proceedings in the light of the *King* decision (*Northern Pacific Ry. Co.* v. *Montana,* 344 U. S. 905), the district court held that since the Commission's findings were substantially the same as those approved in *King,* it "necessarily" followed that its findings were adequate to support its order. *Montana* v. *United States,* 117 F. Supp. 174, 177 (D. Mont.). Two other district court decisions, both subsequently affirmed by this Court, upheld the adequacy of Section 13 (4) findings upon the express basis that they were essentially the same as those held to be sufficient in *King. Tennessee* v. *United States,* 113 F. Supp. 634, 638 (M. D. Tenn.), affirmed, 346 U. S. 891; *North Carolina* v. *United States,* 128 F. Supp. 718, 722 (E. D. N. C.), affirmed, 350 U. S. 805.

It also seems clear that it is in recognition of the controlling effect of the *King* decision that other suits to set aside Section 13 (4) orders have not challenged the Commission's findings except on the basis of insufficient evidentiary support. See *Louisiana Public Service Comm.* v. *United States,* 125 F. Supp. 180 (E. D. La.), affirmed, 348 U. S. 885; *South Carolina* v. *United States,* 136 F. Supp. 897 (E. D. S. C.), affirmed, 351 U. S. 944; *Arkansas Public Service Comm.* v. *United States,* 147 F. Supp. 454 (E. D. Ark.); *Public Service Comm. of Utah* v. *United States,* No. 15, this Term. In short, the Commission, litigants and the courts have all viewed the *King* decision as definitive with respect to requisite findings

[10] *Montana* v. *United States,* 106 F. Supp. 778, 786 (D. Mont.).

in a Section 13 (4) proceeding growing out of a prior interstate revenue proceeding.

Appellants' challenge to the findings rests solely on *Chicago, Milwqukee, St. P. & P. R. Co.* v. *Illinois,* 355 U. S. 300. This was not the usual situation presented in a Section 13 (4) proceeding, that is, enforcement of the section in its relation to the objectives of Section 15a—fixing rates at levels which will enable the nation's railroads to furnish adequate and efficient transportation service. In the *Milwaukee* case, the Commission found that the intrastate rates applicable to the passenger commuter service which the railroad rendered in the Chicago area discriminated against interstate commerce because these rates did not cover the out-of-pocket costs of the service.

The Commission, in its Section 13 (4) report in that case, had recognized that the deficit from the Milwaukee Roads' total passenger operations "is relatively greater than from its suburban operations" (355 U. S. at 308, fn. 7). Discrimination is the different treatment of what is alike. On the facts involved in *Milwaukee,* the question was whether a revenue drain resulting from local commuter service was discriminatory against interstate commerce when the findings disclosed an equal or greater drain from total passenger operations, presumably predominantly interstate. If, therefore, the test is revenue drain from intrastate passenger service versus revenue drain from interstate passenger service, the Commission's findings showed no unjust discrimination against interstate commerce.

In *Milwaukee* the Court said that a "fair picture" of whether the intrastate traffic unduly discriminated against interstate traffic was not shown when the Commission limited its consideration to the revenue drain of the particular commuter service "in disregard of the revenue contributed by the [Milwaukee Road's] other intrastate services," and that in the circumstances of that case findings were required which "reflect the commuter service deficit in the totality of intrastate revenues". 355 U. S. at 308. But here, in contrast to the situation in *Milwaukee,* the contested intrastate rate increase was in effectuation of a rate increase the very premise of which was the "totality" of intrastate and interstate revenues. In addition, the directly comparable rates for transportation of bituminous coal between out-of-state points and Minnesota points currently bore the increase found to be requisite to achieve the statutory objectives. The essence of appellants' claim is that intrastate commerce should be immune from making any contribution to the needed increase in the totality of the affected railroads' revenues. Nothing said by this Court in *Milwaukee* suggests that the Court there overruled, or drastically limited, its holding in *King* in which, as previously stated, the findings were of the same scope and character as those made here.

III

Appellants also question the sufficiency of the evidence to support certain of the Commission's findings. Insofar as they raise the question of the adequacy of the evidence as to "railroad revenues" (J. St. 18–19),

their contention is not that the Commission's findings lack evidentiary support, but that the findings themselves are insufficient (a point already discussed, *supra*, pp. 7–12).

The finding that transportation conditions are no more favorable for intrastate commerce than for interstate commerce clearly is based on substantial evidence. Aside from the testimony underlying the finding that there is no difference from an operating standpoint between the two classes of traffic, there were findings, supported by evidence, that the percentage of all intrastate traffic transported in local trains was over three times the percentage of interstate traffic handled in such trains; that the wages of crewmen on local trains are substantially higher than on through trains; and that through trains operate between terminals at relatively high speeds with few intermediate stops, whereas local trains operate for shorter distances with stops at practically all local stations, resulting in proportionately higher switching and terminal costs.[11] In *New York* v. *United States*, 98 F. Supp. 855, 860 (N. D. N. Y.), affirmed, 342 U. S. 882, the court, in upholding a Section 13 (4) order, said that whether similarity in transportation conditions exists is "a question of fact", and that "as laymen we would hesitate to reverse a finding made by an expert body whose experience with the use and meaning of the terms lends added weight to its findings."

[11] 300 I. C. C. 201, 205–206; Tr. 44, 45, 47–48, 52, 67–68, 70, 72, 77, 78, 81, 86, 94; Exs. 13, 14.

Appellants urge inadequacy in the evidence underlying the finding that the carriers' revenues will be substantially increased by the increase in intrastate bituminous coal rates ordered by the Commission (J. St. 25–26). Appellants recognize that there was conflicting evidence on this issue, which necessarily involves forecast and prediction, and they therefore, in reality, are asking that this Court review the evidence for itself and substitute its judgment for that of the Commission. We submit that the court below was correct in stating that the Commission "is in a far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers in this regard" (J. St. 43).

Appellants also assert lack of substantial evidence to support the finding that the existing Minnesota intrastate bituminous rates were abnormally low, and they emphasize the absence of evidence as to the cost of moving bituminous coal in Minnesota intrastate commerce (J. St. 26). Appellants are thus asking the Court to repudiate its consistent rulings that general revenue proceedings under Section 15 (a) and related Section 13 (4) proceedings do not require a fully developed rate determination as to each rate involved, or evidence of costs and revenues segregated as between interstate and intrastate traffic. See *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 588; *United States* v. *Louisiana*, 290 U. S. 70, 75–76, 78–79; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483–484; *King* v. *United States*, 344 U. S. 254, 275. The his-

tory of Minnesota intrastate bituminous coal rates and the rates for interstate transportation of bituminous coal between various destinations, which were before the Commission, afforded, we submit, sufficient foundation for its finding that the existing intrastate rates were abnormally low.

Finally, appellants urge error in the admission of two exhibits without requiring that the underlying data be made available and in restricting cross-examination with reference to this data (J. St. 27–30). But it is plain, as the court below held, that the errors in these evidentiary rulings, "if any, are not of sufficient gravity to justify" setting aside the Commission's order (J. St. 47).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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IN THE

# Supreme Court of the United States

October Term, 1957

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NORTH WESTERN–HANNA FUEL CO., ET AL,
*Appellants;*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA,
*Appellees,*

and

CANADIAN NATIONAL RAILWAY COMPANY, ET AL,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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## MOTION TO AFFIRM

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IN THE

# Supreme Court of the United States

October Term, 1957

No. _____

North Western-Hanna Fuel Co.,
Berwind Fuel Company,
Carnegie Dock and Fuel Company,
Inland Coal & Dock Company, Division of
The North American Coal & Dock Company,

*Appellants,*

v.

United States of America,
Interstate Commerce Commission,

and

Railroad and Warehouse Commission of the
State of Minnesota,

*Appellees,*

and

Canadian National Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Chicago, Rock Island and Pacific Railroad Company,
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Duluth & Northeastern Railroad Company,
Duluth, Missabe and Iron Range Railway Company,
Duluth, Winnipeg and Pacific Railway Company,
Great Northern Railway Company,
Illinois Central Railroad Company,
Minneapolis & St. Louis Railway Company,
Minneapolis, Anoka and Cuyuna Range Railroad Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company,
Minnesota, Dakota & Western Railway Company,
Minnesota Western Railway Company,
Northern Pacific Railway Company,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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## MOTION TO AFFIRM

Appellees,[1] pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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[1]This motion to affirm is made on behalf of the following common carriers by railroad serving the State of Minnesota, who are intervening defendants below, viz.:
Canadian National Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Chicago, Rock Island and Pacific Railroad Company,
Chicago, St. Paul, Minneapolis and Omaha Railway Company,
Duluth & Northeastern Railroad Company,
Duluth, Missabe and Iron Range Railway Company,
Duluth, Winnipeg and Pacific Railway Company,
Great Northern Railway Company,
Illinois Central Railroad Company,
Minneapolis & St. Louis Railway Company,
Minneapolis, Anoka and Cuyuna Range Railroad Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company,
Minnesota, Dakota & Western Railway Company,
Minnesota Western Railway Company,
Northern Pacific Railway Company.

## STATEMENT

This is a direct appeal under 28 U.S.C. Secs. 1253 and 2101 (b) from the final judgment and decree entered on December 26, 1957, by a district court of three judges specially constituted pursuant to 28 U.S.C. Secs. 2284 and 2325 which, *per curiam,* dismissed appellants' complaint. The complaint was filed in the United States District Court, Fourth Division, State of Minnesota, under the provisions of 28 U.S.C. 1336, seeking to suspend, annul, enjoin and set aside the report and findings of the Interstate Commerce Commission dated April 23, 1957, and the order of the Railroad and Warehouse Commission of the State of Minnesota dated May 20, 1957, issued in compliance therewith.

The opinion of the court below is not yet reported but is set forth in Appendix A of Appellant's Jurisdictional Statement. The order of the court below is set forth in Appendix B of Appellant's Jurisdictional Statement. The report and findings of the Interstate Commerce Commission in that Commission's Docket No. 31798, *Minnesota Intrastate Freight Rates and Charges* are reported in 300 I.C.C. 201.

In proceedings before the Interstate Commerce Commission, designated as *Ex Parte 175, Increased Freight Rates, 1951,* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589, 289 I.C.C. 395 and 297 I.C.C. 17, that Commission found just and reasonable, and authorized, for application on interstate commerce throughout the United States and including interstate commerce moving from, to and within the State of Minnesota, increases in freight rates and charges amounting in the main to 15 percent, subject to certain maximums, limitations and hold-downs. An increase of 12 percent, subject to a maximum of 20 cents per net ton was authorized for application on

bituminous coal. The increases so authorized were found necessary in order to offset the railroads' increased costs and expenses incurred by reason of increases in wages, materials and supplies. In a series of hearings before the Railroad and Warehouse Commission of the State of Minnesota, increases corresponding to those authorized in Ex Parte 175 were sought for application on Minnesota intrastate traffic. The Minnesota Commission authorized certain increases on Minnesota intrastate traffic but excepted certain commodities from any increases. In addition to bituminous coal, the commodities so excepted included anthracite coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs and jack pine and aspen timber) and sugar beets.

By petition dated May 3, 1955, filed May 9, 1955, the rail carriers serving the state of Minnesota requested that the Interstate Commerce Commission institute an investigation of the rates and charges applicable on the commodities which had been excepted from the Minnesota Commission's authorizations, alleging, among other things, that the rates and charges applicable to the excepted commodities cast an undue burden upon, and resulted in unjust discrimination against, interstate commerce, and further resulted in undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand and interstate and foreign commerce on the other. Thereafter, the Commission by order dated June 8, 1955, as corrected by a second order dated June 30, 1955, instituted the investigation prayed for under Section 13 of the Interstate Commerce Act (49 U.S.C. Sec. 13).

Hearing before the Interstate Commerce Commission was held on January 24, 25, 26 and 27, 1956, at St. Paul, Minne-

sota, before one of the Commission's hearing examiners, briefs filed, and a proposed report issued. Exceptions were filed, replies thereto made, and oral argument was held before the full Commission, which thereafter issued its report and findings dated April 23, 1957, wherein the Commission made the following findings and conclusions (300 I.C.C. at pages 223-224):

"We find and conclude that:

"1. The transportation conditions incident to the intrastate transportation of freight in Minnesota are not more favorable than those between Minnesota and interstate points.

"2. The amounts and percentages by which interstate freight rates and charges between points in Minnesota and points in other States were authorized to be increased in Ex Parte No. 175 are just and reasonable.

"3. The present Minnesota intrastate rates and charges on anthracite, bituminous coal, coke, crushed rock, agricultural limestone, forest products (pulpwood, wood bolts, short logs, and jack pine and aspen timber), and sugar beets are abnormally low and are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, thus accomplishing the purposes of the act, as set forth in the national transportation policy declared by the Congress, that the burden thus cast upon the interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be if augmented by the increases authorized generally on the same commodities in Ex Parte No. 175, and that these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Minnesota intrastate rates on the commodities in issue herein the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Minnesota and adjoining States under our authorization in Ex Parte No. 175, provided, however, that increases may not be made which result in levels of rates and charges higher than the general levels of interstate rates and charges maintained on like traffic for movements to and from points in Minnesota.

"5. The establishment of increased intrastate rates and charges as provided in finding 4 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, will increase the respondent's revenue substantially, and will provide not more than a just proportion of the respondent's total railway operating income.

"6. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 4 are required from intrastate traffic in Minnesota in order to enable the respondents to furnish adequate and efficient railway transportation service.

"The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of Minnesota, or of any interested party, to apply for modification thereof as to any individual rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

"An order carrying into effect the foregoing findings and conclusions will be entered, unless this Commission is notified by the Minnesota Commission within 30 days from the service of this report that the State Commission

will permit the increases required to remove the unlawfulness herein found to exist."

Thereafter, the Minnesota Commission, by order dated May 20, 1957, authorized application of the increases in issue, and such increases became effective on July 1, 1957, on all commodities in issue with the exception of bituminous coal, as appellants, commercial coal dock operators, instituted this action in the court below. An order was issued below on June 27, 1957, temporarily restraining the increases authorized on bituminous coal. The railroad appellees herein were permitted to intervene and become party defendants on July 12, 1957. The case was submitted to the court below on the record made before the Interstate Commerce Commission, briefs were filed and oral argument made. On December 26, 1957, the court below rendered its decision and judgment herein dismissing the complaint and vacating and setting aside the temporary injunction. Notice of appeal was filed January 20, 1958. By order of January 21, 1958, the court below denied plaintiffs' motion to continue the stay and temporary injunction, or in the alternative, an injunction pending appeal to this Court. An application to Mr. Justice Whittaker under date of January 25, 1958, was denied by order of January 31, 1958, providing:

"Appellants' application for a stay and for continuance or reinstatement of temporary injunction, r, alternatively, for an injunction, is denied, without prejudice to renew in the event this Court shall note probable jurisdiction of this appeal, or postpone further consideration thereof to a hearing on the merits."

The increase in the rates on bituminous coal moving in Minnesota intrastate commerce became effective January 26, 1958.

## ARGUMENT

The per curiam decision of the statutory three judge court below is clearly correct and should be affirmed. The jurisdiction of the Interstate Commerce Commission and the authority for the exercise of federal power pursuant to Section 13 (4) of the Interstate Commerce Act is well established and confirmed in numerous decisions of this Court. *Wisconsin R. Comm. v. C. B. & Q. R. Co.*, 257 U.S. 563, *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, *King v. U. S.*, 344 U.S. 254.

The findings in the case at bar conform to the standards and requirements for findings in proceedings under Section 13 (4) enunciated by this Court in *King v. U. S.*, 344 U.S. 254. (See also *North Carolina v. U. S.*, 325 U.S. 507.) In the case at bar the Commission found "that these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce." (Finding 3.) This ultimate finding, if supported by adequate subsidiary findings, sustains the authority of the Commission and the validity of the Commission's order. *King v. U. S.*, supra, p. 269; *North Carolina v. U. S.*, 325 U.S. 507, 514; *Florida v. U. S.*, 292 U.S. 1; *U. S. v. Louisiana*, 290 U.S. 70. Turning to the subsidiary findings made in the case at bar, it is again apparent that they wholly conform to those held sufficient in the King Case.

This Court's discussion of the necessary subsidiary findings appears in the *King Case* at pages 270 to 272, and 274 to 276. Comparing the subsidiary findings in the case at bar with those made in *King*, we find that Finding 1 herein compares with Finding 2 in *King*. Finding 3 in *King*, compares with Finding 2 and with a part of Finding 5 herein. Finding 3 herein, which in part provides that the present Minnesota

intrastate rates and charges * * * on bituminous coal * * * (is) abnormally low and * * * not contributing their fair share of the revenues required * * *" and that "the burden thus cast upon the interstate commerce is undue," compares with the essentials set forth in Finding 5 of *King*. Finding 5 herein corresponds to Finding 6 in *King* in part and to Finding 3 in part in *King*. Finding 6 herein is in addition to any finding made in *King*. Likewise in the case at bar, the Commission has included the savings clause referred to in *King* and in *North Carolina v. U. S., supra,* at 518, 535.

An analysis of appellants' objection to the Commission's findings in the case at bar clearly indicates that appellants sole objection thereto is that the Commission has failed to make its specific findings in dollars. This contention was completely rejected by this Court in the *King Case, supra,* page 274. In this connection, appellants refer to this Court's recent decision in *Chicago, M. St. P. & P. R. Co. v. Illinois,* decided January 13, 1958, 355 U.S. 300.

It is respectfully submitted that the latter case, referred to as the *Milwaukee Commuter Case,* is clearly distinguishable from the case at bar wherein the findings fully conform to those found sufficient by this court in *King v. U. S.*, 344 U.S. 254. The *Milwaukee Case* involved only commuter passenger fares, of only one railroad, and only a portion of the Milwaukee's total intrastate passenger operation in the State of Illinois. Moreover, that proceeding did not have as its genesis, a nation-wide general revenue increase case such as *Ex Parte 175* which is the proceeding underlying the case at bar. In short, in the *Milwaukee Case* the Commission had not, as in the case at bar, determined the justness and reasonableness of the increases on each and every commodity; nor had the Commission prior to passing upon the Milwaukee Com-

muter fares necessarily considered the revenues from interstate and intrastate traffic. In *Ex Parte 175,* in establishing the percentages and increases for application to various commodities, the Commission had taken into account the total revenue needs of the railroads from interstate and intrastate operations alike and it also, of necessity, had taken into consideration assuredly, the passenger deficit of the railroads as a whole, including the passenger deficit from both interstate and intrastate traffic. Moreover, the finding with respect to the revenue discrimination in the ***Milwaukee Commuter Case*** does not correspond to the finding made by the Commission in numerous proceedings instituted pursuant to Section 13 (4) of the Interstate Commerce Act and particularly did not conform to the finding which had been found as sufficient by this Court in *King v. U. S.*, 344 U.S. 254. The Commission, in Finding 5 in the case at bar, found that the establishment of increased intrastate freight rates and charges "* * * will provide not more than a just proportion of the respondents total railway operating income." In the *Milwaukee Commuter Case,* the lower three-judge court, 146 F. Supp. 195, at page 199, found that the finding of a "fair contribution to respondent's indirect cost and return on investment" was not the same as the finding in the *King Case* which corresponds to the finding in the case at bar.

Notwithstanding the foregoing, it is apparent from the decision of this Court that the ***Milwaukee Commuter Case*** was considered unique. In the *Milwaukee Commuter Case,* the Court stated that the precise situation presented therein had not theretofore been considered by the Court. The Court, moreover, referred to certain non-passenger fare cases in which Interstate Commerce Commission orders had been sustained, namely, *U. S. v. Louisiana*, 290 U. S. 70; *Florida v.*

*U. S.*, 292 U.S. 1, and *King v. U. S.*, 344 U.S. 254. It is to be borne in mind that contrary to the *Milwaukee Case*, the decision in the instant proceeding involves state-wide application of rates on bituminous coal. This fact is equally true with respect to the remaining commodities which were in issue before the Commission in Docket 31798. In other words, a statewide basis of rates was in issue. It is true that only eight commodities were involved in the petition in the case at bar but the discrimination, as is clearly evinced from the Commission's report, was directed solely to the discrimination caused by the few commodities in issue. In *U. S.* v. *Louisiana*, supra, the statewide application of only some 37 commodities was issued. In *Florida v. U. S.*, supra, referred to as the *Florida Log Case*, only one commodity was involved and in *King v. U. S.*, although all commodities in the state were involved to the extent of the 5 percent differentiation following *Ex Parte 166*, the case likewise involved only a few commodities with respect to the differentiation, state v. interstate, resulting from the *Ex Parte 162* increases. Likewise in the *Milwaukee Commuter Case*, the Court refers to *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, which involved only one charge, namely, a switching charge. It is apparent therefore that in the *Milwaukee Case* the Court was considering a new situation distinguishable from the case at bar which stems from a general revenue proceeding wherein the revenue contribution required from each commodity had been previously determined.

In the interest of brevity, the appellee railroads refer this Court of the lower court's discussion of the evidence as well as the evidentiary material contained in the report of the Interstate Commerce Commission in that Commission's Docket 31798. It is respectfully submitted that the findings

herein are completely supported by the evidence and the lower court's determination in this respect should be affirmed. Only one discussion of the evidence is warranted in this motion and that is directed to the appellants' contention of errors in the admissibility and scope of cross-examination of Exhibits 13 and 14. The court below fully reviewed this contention of the appellants and stated:

> "Our consideration of the record in support of the findings made by the Commission as to the need for increased revenue on bituminous coal * * * convinces us that substantial evidence supports its findings. Any alleged prejudice resulting from any error of the examiner in determining the sufficiency of the foundation for certain evidence received and the other procedural matters of which complaint is made do not require any discussion. The errors, if any, are not of sufficient gravity to justify the setting aside of the order of the Commission." (Jurisdictional Statement, p. 47)

The railroad appellees wish to point out that the exhibits to which complaint is directed supplemented direct oral testimony clearly establishing that the unit cost of intrastate traffic was at least equal to the unit cost of interstate traffic.

Appellants' contention that a separation of the railroads' intrastate and interstate revenues, costs, and expenses is essential, has been rejected previously by this Court. *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, 483, 484; *Wisconsin Railroad Commission v. C. B. & Q. RR.*, 257 U.S. 563, 587. This contention is therefore without merit.

## CONCLUSION

The railroad appellees respectfully submit that appellants present no substantial questions herein for the decision of this Court, and that the judgment decree and order of the District Court should be affirmed.

Dated at St. Paul, Minnesota, this 17th day of April, 1958.

Respectfully submitted,

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